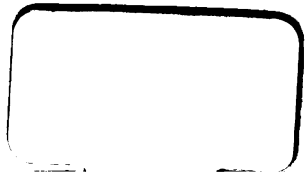

THE

LAW OF INSOLVENCY.

BEING

THE VOLUNTARY AND INVOLUNTARY LAW OF CALIFORNIA; WITH FULL ANNOTATIONS AND REFERENCES TO THE DECISIONS OF THE SUPREME COURT OF CALIFORNIA, AND OTHER DECISIONS APPLICABLE.

ALSO

AN APPENDIX WITH FORMS.

BY

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PREFACE.

The insolvency law of California is in most respects similar to the United States bankruptcy law which was repealed in the year 1878. The sections of the United States law upon which the similar sections of the California Act are founded, are given in notes to the text, and following are notes of decisions of the United States and other courts, illustrating and explaining the national law. The authorities cited under the several sections of the California Act are taken from decisions of the California Supreme Court in cases explaining clauses and words of the general law governing frauds against and by creditors; and illustrating, in these respects and others, the practice of the courts of the state. Much labor has been expended upon the forms. They are nearly all new. If they contain superfluous words, it is not because there has not been an effort to condense. It is not to be hoped that their brevity will be recognized as a sign of peculiarity or originality. In an age of condensation there is no good reason why the "forms" used by legal practitioners should not be very much reduced in length. The author's aim has not been to prepare "forms" for every possible emergency, but to make only those necessary in a very large majority of cases. Hoping that the book will be useful, it is respectfully submitted to the bench and bar.

J. F. COWDERY.

June 25, 1880.

INTRODUCTION.

Insolvent Defined, etc.—Blackstone, in his Commentaries, vol. 2, 285, 471, defines an insolvent person as one who is unable, from any cause, to pay his debts, or who is unable to pay his debts as they fall due, in the usual course of trade or business: See 2 Kent's Commentaries, 389; 3 Dowl. & R. 218; Sugden on Vendors, 487. In its primary sense, insolvency is more extensive in meaning than bankruptcy. Bankruptcy denotes the condition of a trader or merchant who is unable to pay his debts in the usual course of business. Story, J., in 3 Stor. C. C. 453, derives "bankrupt" from *bancus ruptus*, a broken bench or counter, showing that the use of the word is confined to describing broken merchants or tradesmen. The preamble to the statute 34 and 35 Henry VIII., chap. 6, A. D. 1542, is as follows: "Whereas divers and sundry persons, craftily obtaining into their own hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors their debts and dues, but, of their own wills and pleasures, consume the substance obtained by credit of other men for their own pleasure and delicate living, against all reason, equity and good conscience." It appears from this that the word bankrupt was only applied to a dishonest merchant or trader. This meaning is now, by common usage, changed, and no dishonesty attaches to its use, but the word is still properly applied only to traders and merchants. Insolvency, then, strictly applies to any person not a trader or merchant who can not pay his debts. Both bankruptcy and insolvency laws contemplate an equal distribution of the insolvent or bankrupt person's property. Congress having the power to establish a uniform rule of the subject of bankruptcies (Const. U. S., arts. 1 and 8), the several states, from a desire of avoiding what might seem to be an infringement upon the exclusive right of Congress, have mostly termed their laws upon the subject "insolvency laws," or "acts

for the relief of insolvent debtors." Such legislation has obliterated the distinction between bankruptcy and insolvency laws, and there appears to be now, in effect, no practical difference between the two words.

Authority to Make a Bankrupt Law. — In *Ogden* v. *Saunders*, 12 Wheat. 218, it was held that the power of making a bankrupt law, which shall be binding upon all creditors, and all description of debts, rests in Congress, and when Congress acts, its authority is exclusive, and thereby the state laws are rendered inoperative.

Operation of State Laws.—That the state laws only operate upon creditors residing in the state where the debtor resides is affirmed in *Cook* v. *Moffat*, 5 How. 295.

Discharge, When not a Bar.—A discharge will not bar a note due a citizen of another state: *Baldwin* v. *Hale*, 1 Wall. 223, 234. It is not a bar to debts contracted in other states, unless it appear that the plaintiff proved his debt against the defendant's estate in insolvency, or in some manner became a party to the proceedings: *Gilman* v. *Lockwood*, 4 Wall. 409.

Contracts between Citizens of Different States.—It has been also decided that an insolvent law can not be made to apply to contracts made within the state between a citizen of the state and one who is a citizen of another state: *Ogden* v. *Saunders*, 12 Wheat. 213.

Foreign Creditor, When Bound by Proceedings.—If a creditor out of the state voluntarily makes himself a party to the proceedings under the insolvent laws of the state, and accepts a dividend, he is bound by his own act, and is deemed to have waived his ex-territorial immunity and right: *Sturgis* v. *Crownshield*, 4 Wheat. 122; 3 Story Const. 252–256; and there are numerous other cases to the same effect.

Obligation of Contracts not to be Impaired.—The act of 1880, not being amendatory of the act of 1852, supplemented by the act of 1876, but being independent of those statutes, seems only to affect contracts made after it went into operation, which was June 16, 1880. Any other view recognizes the right of a state to pass laws impairing the obligation of a contract. An insolvency law permitting a debtor's discharge from debts created while the law is in force, does not impair a contract. The law of the place where the agreement is made enters into and becomes part of the contract; and a debtor's obligations made after the taking effect of the law of 1880,

may be discharged upon compliance with the terms of the act. This view is sustained by the reasoning in *Sturgis* v. *Crowninshield*, 4 Wheat. 122; *Farmers' and Mechanics' Bank* v. *Smith*, 6 Id. 131; *McMillan* v. *McNeill*, 4 Id. 209; *Ogden* v. *Saunders*, 12 Id. 213, and cases referred to.

Repeal of Conflicting Laws.—Section sixty-eight of the Act of 1880 repeals all laws in conflict with its provisions, except that pending cases are not affected. Unless the courts hold that the Act of 1852, and the supplemental Act of 1876, are not in conflict with the provisions of the Act of 1880, there can be no discharge from debts contracted prior to the sixteenth day of June, 1880, unless the acts of 1852 and 1880, and the supplement of 1876, are treated as one.

It will not be presumed that the legislature intended to repeal the existing law. If the intention was to repeal all laws upon the subject of insolvency, the Acts of 1852 and 1876 would have been mentioned by title, but only "conflicting laws" are mentioned. Subsequent statutes do not abrogate former ones by containing different provisions on the same subject; they must be contrary to produce that effect: *Saul* v. *His Creditors*, 5 Martin La. 569; same case, 16 Am. Dec. 212.

Conflict of Laws.—Each law takes hold of an insolvent debtor's estate and distributes it ratably among his creditors, and in proper cases grants a discharge to the debtor. So far the Acts are in harmony with each other. If there is a conflict it is in the practice, not in the substance of the law. When two laws upon a cognate subject, passed at different times, are inconsistent with each other, the one first passed must yield to the latter: *Estate of Wexom*, 35 Cal. 320; *McMann* v. *Bliss*, 31 Cal. 122. See, also, *Ex parte Smith*, 40 Id. 419; *People* v. *Burt*, 43 Id. 560, and there are numerous other cases to the same effect.

Assignments for Benefit of Creditors.—The Act of 1880 must also be read and construed in connection with Title III., Part II. of the Civil Code, allowing general assignments for the benefit of creditors. See *Billings* v. *Billings*, 2 Cal. 107; *Dana* v. *Stanford*, 10 Id. 269; *Wellington* v. *Sedgwick*, 12 Id. 469; *Cheever* v. *Hayes*, 3 Id. 471; *Cheever* v. *Woods*, 8 Id. 152; *Nagle* v. *Lyman*, 14 Id. 450; *Lawrence* v. *Neff*, 41 Id. 566.

Construction of the Act.—The statute, being in derogation of the common law, will be strictly construed. All the requirements of the statute must be strictly complied with: *McAllister*

v. *Strode*, 7 Cal. 428; *Judson* v. *Atwill*, 9 Id. 478. Proceedings in insolvency are special, and no intendment can be made in favor of the jurisdiction: *McDonald* v. *Katz*, 31 Id. 167. Nor will the liberal construction established by section 4 of the Code of Civil Procedure be allowed, the statute not being part of one of the codes.

Schedule, Inventory.—Wherever the words "schedule" and "inventory" are used in the Act, in different sections, there can be no reasonable doubt that they are used as synonymous terms: Bump's Bankruptcy, 13. But where they are used as in sections 5 and 6, which require the "petition," "schedule," *and* "inventory" to be verified and filed, the meaning is not clear, especially as, in construing statutes, effect must be given to every word: *Langenoar* v. *French*, 34 Cal. 92. However, as the word "inventory" has a general meaning, applicable to insolvency and bankruptcy proceeding (Bouvier's Law Dic.), and as the word "schedule" has a limited meaning (Id.), and as it will be difficult to affix a separate meaning to each word as herein used, they should be regarded as of one meaning.

Serving Debtors of Insolvent.—There appears to be no provision for serving the debtors of the insolvent with the order provided for in section nine, forbidding the payment of any debts and the delivery of any property to the insolvent. Nor is provision made for making and filing the schedule, if the debtor appears in involuntary proceedings, without it resides in the power to punish delinquents for contempt, under the provisions of section sixty-four.

Proof of Debts.—The Act contemplates that all debts must be finally proved in court; but if the language used is only considered, the filing of an uncontested verified claim is sufficient, under section fifteen, to permit a claimant to participate in the election of assignee. The forms in the appendix are prepared under the belief that the superior courts will, by rule, not only require a verified claim to be filed, but an allowance by the judge before the claimant participates in the choice of assignee. The authority to do this is found in section forty-seven, where it is provided that witnesses may be examined in respect to alleged debts.

Sales of Property.—Under section twenty-one the assignee is given authority to sell, at public auction, all the estate of the insolvent, and as ordered by the court. Under section twenty-five, which apparently deals only with private sales, a petition,

notice, and order are necessary; and as no provision is made for sale at public auction other than as provided in section twenty-one, it would seem that the assignee may sell at public auction upon his own volition, "*and*," also, as "ordered by the court;" but as section twenty-six provides how certain perishable and other property may be sold; and as there is no good reason why an assignee should have authority to sell, without an order, property not perishable, etc., and should be required to obtain an order to sell perishable property, it seems, considering the Act as a whole, and applying strict rules in construing it, that the assignee has no authority to sell any property of the estate without an order of court. Those who take the opposite view will find support in the provisions of the national law respecting the authority of assignees.

Service by Publication.—Section ten provides that an alleged involuntary insolvent may be served with notice of proceedings as is provided by law for the service of summons in civil actions; and if a debtor cannot be found or his place of abode ascertained, service shall be made by publication. Cases frequently occur where a party can not be found, but whose place of abode is well known; and in such cases it will be difficult to perfect service without he is personally served out of the state, which would be equivalent to publication. One may not be able to find a debtor, but his place of abode may be known to be in Afghanistan.

Actions Pending.—Section eighteen makes provision for the substitution of the assignee as plaintiff in all actions prosecuted by the debtor, but no provision is made for defenses by the assignee. In the national law there is a provision for defenses by the assignee of pending actions, which was *ex industria* omitted from the California law, apparently showing that the legislature intentionally denied the assignee authority to defend pending actions against the insolvent. It will be also noticed that the assignee is limited to the right to be substituted in pending actions for the recovery of "a debt or other thing." If "damages" are not classified as "things," then the assignee can not be substituted in actions to recover damages, unless authority of substitution is found in the provisions of the law outside of this Act.

Notice by Mail.—Under section thirty-four provision is made for notice to creditors by the assignee that he has filed his account, but no provision is made for the number of days notice creditors shall receive of the intended application for his dis-

charge; therefore, it seems that a reasonable time must elapse between deposit of the notice in the post-office and the day upon which application will be made, which time will be long or short, as the creditors reside near to or remote from the place where the court is held; also the facility for communication by mail will be considered.

Corporations under the Law.—The Act is expressly made applicable to corporations; but as foreign corporations are necessarily non-residents, it will not apply to them. The legislature evidently intended that it should apply to all corporations; commercial, speculative, mining, *benevolent, religious, and fraternal.* The national law was only applicable to "moneyed, business, commercial corporations, and joint stock companies:" p. 53, *post.* The wording of the national law and the California Act is nearly identical, except the last has no words limiting its application; therefore, it is not difficult to understand what the legislature intended.

Examination of Debtor.—Section forty-seven permits the examination upon oath of a debtor before or after adjudication in insolvency. In cases of voluntary insolvency, the adjudication is not necessarily made immediately upon the filing of his petition by the debtor; and when application is made to the judge for an order adjudicating the petitioner an insolvent debtor, the judge may then examine him, or may permit a creditor to do so, and in proper cases the court may refuse to adjudicate the petitioner an insolvent debtor. The courts may, by a general rule or special order, require notice of the filing of the petition to be given to the creditors, so that they may have an opportunity to contest the application. In involuntary proceedings there will be no difficulty in such examinations, as the adjudication is not made until the fact of insolvency is tried and determined against, or until the debtor defaults. The national law, page 71, *post*, is nearly identical, except the California statute contains the words " before or after adjudication in insolvency," thereby indicating very clearly the legislative intent.

Amendments of Petition and Discharge of Debtor.—Section eight allows amendments to the creditor's petition in involuntary proceedings, but no express authority is given to amend a debtor's petition; nor is there any clause making the provisions of the Code of Civil Procedure applicable, except in the special cases mentioned in sections 10, 11, 24, 31, 47, 50, 60, 63, 64, and 67. Section 5020 of the national law is as

follows: "Every bankrupt shall be at liberty, from time to time, upon oath, to amend and correct his schedule of creditors and property, so that the same shall conform to the facts." This provision, except as above, is entirely omitted; which seems to exclude the right to amend in every case.

It is reasonable to suppose that authority to amend his petition was not given to the debtor, because it is provided in section fifty-three that his discharge shall be from all claims, debts, liabilities, and demands, set forth in his schedule, or which "*were or might have been proved against his estate.*" Also under section fifty-one, he is discharged from all provable claims. As all debts are provable, whether described in, or omitted from, the schedule, authority to amend is not of great importance to the debtor.

Sheriff to Take Possession of Debtor's Property.—Under the provisions of section six the sheriff takes possession of all the property of the debtor in voluntary proceedings as soon as the petition is filed, and it will be his duty to deliver it to the assignee appointed by the court or the creditors, at the time the clerk of the court makes his assignment as provided in section seventeen.

Sheriff to Prepare Schedule.—Section fourteen, so far as applicable to the Sheriff, is the author's *pons asinorum*. Why should the Sheriff prepare the schedule in any event? Why should he prepare the schedule after an assignee has been appointed? There is no provision making the Sheriff *ex officio* assignee of insolvent debtor's estate; therefore it is reasonable to suppose that the word Sheriff was inserted in this section by mistake.

Assignee, Who may Vote for and Be.—Section 5035 of the national law provided that no person who has received any preference contrary to the provisions of the Act shall vote for or be eligible as assignee. This provision did not meet with the approval of the legislature, and therefore there is no such, or any, inhibition in the California Act. Section six of that Act provides for the election of one or more assignees; but section fifteen, which expressly governs the subject, provides that at a meeting of creditors, in open court, they shall proceed to the election of *one* assignee. Here is a direct conflict between the order of court calling on the creditors to elect, and authority to elect expressly given. As the Act as a whole treats of the assignee in the singular, the authority to elect more than

one is extremely doubtful, notwithstanding the provisions of section 62.

Pending Cases.—This act does not affect any case in insolvency instituted and pending in any court prior to the day when this Act takes effect. A case is pending when a petition is filed.

THE

INSOLVENCY LAW

OF THE

STATE OF CALIFORNIA,

IN FORCE JUNE 16, 1880.

CHAPTER CLXXV.

AN ACT FOR THE RELIEF OF INSOLVENT DEBTORS, FOR THE PROTECTION OF CREDITORS, AND FOR THE PUNISHMENT OF FRAUDULENT DEBTORS.

Approved April 16, 1880.

The People of the State of California, represented in Senate and Assembly, do enact as follows:

ARTICLE I.

GENERAL SUBJECT OF THE ACT.

SECTION 1. Insolvent may be discharged.
SECTION 1. Act, how known and cited.

SECTION 1. Every insolvent debtor may, upon compliance with the provisions of this Act, be discharged from his debts and liabilities. This Act shall be known and may be cited as the Insolvent Act of eighteen hundred and eighty.

ARTICLE II.

VOLUNTARY INSOLVENCY.

SECTION
2. Application for discharge; Amount of debts; Residence of applicant; Petition to state certain facts; Inventory, schedule and valuation to be annexed to petition; Act of insolvency.
NOTE *a*.—"Judge" and "Court" convertible terms; Residence, not necessary to aver; Debtor need not sign petition; Reference to schedules; Statutory requisites to appear; Petition stands for complaint; May be amended; Schedule to be signed and verified.
NOTE *b*.—Residence, what constitutes; Domicile of wife; Residence jurisdictional.
NOTE 1.—U. S. law; Petition conclusive evidence of insolvency.
2.—Petition not to be withdrawn.
3.—May be dismissed by court.
4.—Motion to set aside petition not entertained.
5.—Residence of bankrupt is with family.
6.—Corporation resides where created.
3. Schedule, what to contain.
NOTE *a*.—Name of creditor to be stated; Amount of indebtedness; Variances in proof; Effect of decree of discharge; Jurisdictional facts.
NOTE 1.—U. S. law; Petition must be true in point of fact.
2.—Sums and dates to be given.
3.—Abode and P. O. address to be stated.
4.—Residence unknown, how stated.
5.—All debts must be included in schedule.
6.—Effect of placing barred debts in schedule.
4. Inventory of all property to be made.

SECTION
4. NOTE *a*.—Inventory means schedule.
NOTE 1.—U. S. law; Schedule to be explicit.
2.—Partner to state his interest in firm.
3.—Assets, what is included in term.
4.—Money advanced to clerk for fees.
5.—Assets, what are.
5. Petition, schedule and inventory to be verified; Contents of affidavit.
NOTE *a*.—Oath to be taken by insolvent personally; Must sign schedule.
6. Court to make order that petitioner is insolvent; Directions to sheriff; Receipt and transfer of property forbidden; Creditors ordered to meet; Debts proved; Publication of notice; Stay of proceedings; Books; Property exempt.
NOTE *a*.—Deposit of books; Neglect to deposit, a fraud.
b.—Order staying proceedings.
7. Order of notice to creditors to be published; How published; Personal service of notice; Service by mail, where to be published; Costs to be deposited.
NOTE *a*.—No intendments in favor of jurisdiction; Notice is a summons; Order for notice may be made at chambers; Proof of publication; No presumptions in favor of jurisdiction; When sufficient; How proved.
b.—Proof of service by mail.
c.—Personal service on creditor.
NOTE 1.—U. S. law; Proceedings not *ex parte*.
2.—After notice by publication, notice is presumed.
3.—Omission to publish notice, effect of.
4.—Notice to be served on foreign creditors.

SEC. 2. An insolvent debtor, owing debts exceeding in amount the sum of three hundred dollars, may apply by petition to the Superior Court[a] of the county, or city and

(*a*) The petition must be addressed to the judge of the county, but the term *judge* and *court* are convertible, and the petition may be addressed to either: *Brewster* v. *Ludekins*, 19 Cal. 162. It is not necessary that it should aver that the petitioner has resided within the county for six months: *Barrett* v. *Carney*, 33 Id. 530. But it is the better practice to do so, as intimated in the decision on rehearing in the case last cited: See Id. page 540.

county in which he has resided[b] for six months next preceding the filing of his petition, to be discharged from his debts and liabilities. In his petition he shall set forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain a discharge from his debts and liabilities, and shall annex thereto a

It is not requisite that the debtor should sign the petition, it may be signed by an attorney: *Brewster* v. *Ludekins*, *supra*.

The statement in the petition may be summary and refer to the schedule for details: *Wilson* v. *His Creditors*, 32 Cal. 406. Everything required by the statute to be stated must appear in the petition; any defect or omission is jurisdictional; and the petition must bring the case clearly within the provisions of the statute before the court has authority to act. The court has no jurisdiction other than that derived from the statute itself: *Meyer* v. *Kohlman*, 8 Id. 47. The petition stands in the place of a complaint, and the same objections, by way of demurrer, may be taken as to a pleading, and it may be amended, if desired, like other pleadings: *Bennett* v. *His Creditors*, 22 Id. 41.

The schedule must be signed and verified by the insolvent personally: *Wilson* v. *His Creditors*, 32 Id. 406. But it is only necessary to sign the last schedule: *Brewster* v. *Ludekins*, *supra*.

Every person has, in law, a residence. "In determining residence, the following rules are to be observed: 1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose; 2. There can be only one residence; 3. A residence cannot be lost until another is gained; 4. The residence of the father during his life, and after his death, the residence of the mother, while she remains unmarried, is the residence of the unmarried minor child; 5. The residence of the husband is the residence of the wife; 6. The residence of an unmarried minor, who has a parent living, cannot be changed by either his own act or that of his guardian; 7. The residence can be changed only by the union of act and intent:" Cal. Pol. Code, sec. 52.

Absence from the state on business of the state or of the United States shall not affect the question of residence of any person: Con., art. 20, sec. 12.

(*b*) The desertion of the husband entitles the wife to her own domicile: *Moffat* v. *Moffat*, 5 Cal. 280. A resident

schedule and inventory, and valuation, in compliance with the provisions of this Act. The filing of such petition shall be an act of insolvency, and thereupon such petitioner shall be adjudged an insolvent debtor.*

of a place does not lose his residence by stopping at another place to reside for a limited time: *Dow* v. *Q. & C. G. M. Co.*, 31 Id. 629. The domicile of the husband is the domicile of the wife: Id. The fact of the residence of defendant is jurisdictional in certain cases: *Jolly* v. *Foltz*, 34 Id. 321. The statute of 1851, p. 186, provided that the plaintiff, in actions for divorce, must have been a resident of this state for six months next immediately preceding the commencement of the action. Under this law it was held that the court has no jurisdiction to grant a divorce unless the applicant aver and prove that he or she has been a *bona fide* resident of this state six months before making the application: *Bennett* v. *Bennett*, 28 Id. 599.

Although the insolvent law makes a residence of six months in the county next preceding the filing of the petition a condition precedent to the right to institute the proceedings, yet it is not necessary to state the fact of residence in the petition: *Barrett* v. *Carney*, 33 Id. 530. But see *Langenour* v. *French*, 34 Id. 92, and *Slade* v. *Creditor*, 10 Id. 483.

* U. S. R. S., Sec. 5014.—If any person residing within the jurisdiction of the United States, and owing debts provable in bankruptcy exceeding the amount of three hundred dollars, shall apply by petition addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next preceding the time of filing such petition, or for the longest period during such six months, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain a discharge from his debts, and shall annex to his petition a schedule and inventory, in compliance with the next two sections, the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt.

1. The petition is conclusive evidence that the debtor is insolvent, and desires to take the benefit of the act: *In re Goodfellow*, 3 B. R. 452.

2. A voluntary bankrupt can not withdraw his petition at pleasure, but must show good reason for doing so. The creditors have an interest in the proceedings from the moment the petition is filed: *In re Harris*, 3 N. Y. Leg. Obs. 152.

3. If a debtor has made a compromise of all his debts, the petition may be dismissed: *In re Randall & Rice*, 1 N. Y. Leg. Obs. 199.

4. A motion to set aside the adjudication on account of the absence of certain jurisdictional averments in the petition can not be entertained. The proper way to raise the question is by specifications against the discharge of the bankrupt: *In re Penn*, 3 B. R. 582.

5. The residence of the bankrupt is the place where his family reside: *Styles* v. *Lay*, 9 Ala. 796.

6. A corporation can have no residence out of the state by whose laws it was created: *In re Ala. & Chat. R. R. Co.*, 6 B. R. 107.

SEC. 3. Said schedule must contain a full and true statement of all his debts and liabilities, exhibiting to the best of his knowledge and belief to whom said debts or liabilities are due, the place of residence of his creditors, and the sum due to each; the nature of the indebtedness or demand,

(*a*) The name of each creditor, with amount and nature of his indebtedness, must be given. If the debt is in judgment it should be so stated; but if, after the filing of the petition, a debt is placed in judgment, there is no merger, but the discharge of the debt under the decree carries with it a like discharge from the judgment: *Imlay* v. *Carpentier*, 14 Cal. 173.

The description should be sufficiently exact to enable the holder to readily identify it, and where the description set out a promissory note, whereas, in fact, the note had been put in judgment a short time before the petition was filed, it was held that the variance was immaterial, as the creditor was sufficiently informed to identify his debt: *Brewster* v. *Ludekins*, 19 Id. 162.

The indebtedness must be described, otherwise the debtor can not be discharged as to those debts: *Barrett* v. *Carney*, 33 Id. 530; *Slade* v. *His Creditors*, 10 Id. 483.

All debts should be stated, whatever their nature, and whether contracted in this state or not.

The court does not owe its jurisdiction to any averment that the debts arose in this state: *Sharp* v. *His Creditors*, Id. 418.

The effect of the decree of discharge is restricted to those debts described with the required particularity: *Slade* v. *His Creditors*, Id. 485. But this rule is to be received with some qualification.

While the provisions of the statute must be followed, yet the question of a sufficient compliance must rest upon the particular facts of each case, for in several decisions it has been held that if the schedule is too meager in its details, or not sufficiently exact, the remedy is by objection, in the nature of a demurrer to the schedule: *Bennett* v. *His Creditors*, 22 Id. 42; *Grow* v. *His Creditors*, 31 Id. 328. But in *Wilson* v. *His Creditors*, 32 Id. 406, it is suggested that the only manner in which the objection may be taken is by filing an opposition. When it is considered that the same court has held that the petition and schedule constitute one pleading, and that they should be attached to each other, and together constitute the complaint, *Wilson* v. *His*

whether founded on written security, obligation, contract, or otherwise; the true cause and consideration thereof, and the time and place when and where said indebtedness accrued, and a statement of any existing pledge, lien, mortgage, judgment, or other security for the payment of the same.*

SEC. 4. Said inventory[a] must contain an accurate description of all the estate, both real and personal, of the petitioner, including his homestead, if any, and all property exempt by law from execution, and where the same is situated, and all incumbrances thereon.†

Creditors, 32 Id. 408, and that the court only acquires jurisdiction by the filing of a petition and schedule setting forth the facts required by the statute, *Langenour* v. *French*, 34 Id. 92, it is hard to discover how there can be a waiver of the necessity of stating jurisdictional facts, or in which cases it may be said that a defect is a matter of substance, and in which a matter of form.

(*a*) The word "inventory" is synonymous with "schedule:" Bump's Bankruptcy Law, 13.

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* U. S. R. S., Sec. 5015.—The said schedule must contain a full and true statement of all his debts, exhibiting, as far as possible, to whom each debt is due, the place of residence of each creditor, if known to the debtor, and if not known, the fact that it is not known; also the sum due to each creditor; the nature of each debt or demand, whether founded on written security, obligation, or contract, or otherwise; the true cause and consideration of the indebtedness in each case, and the place where such indebtedness accrued; and also a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same.

1. Unless the petition is true in point of fact, no discharge will be granted: *In re Redfield*, 2 Brew. 72.

2. Wherever the sum and the date of the debt are given, the statement is sufficient: *In re Hill*, 1 B. R. 16.

3. The abode and post-office address should be both stated: *In re Pulver*, 1 B. R. 46.

4. If the residence of a creditor is unknown, the debtor should state in his schedule, or on a separate affidavit, what efforts he has made to ascertain his present residence. He can not satisfy the law by reposing on the information at hand, and the belief which he may possess, without making any efforts to ascertain such present residences: *In re Pulver*, 1 B. R. 46.

5. Debts barred by the statute of limitations should be placed on the schedules: *In re Perry*, 1 B. R. 220.

6. Placing a debt barred by the statute will not revive it: *In re Ray*, 1 B. R. 203.

† U. S. R. S., Sec. 5016.—The said inventory must contain an accurate statement [and valuation] of all the petitioner's estate, both real and personal, assignable under this title, describing the same and stating where it is situated, and whether there are any, and, if so, what incumbrances thereon.

1. The schedule must be so explicit that the assignee may be enabled to

SEC. 5. The petition, schedule, and inventory must be verified by the affidavit of the petitioner,* annexed thereto, and shall be in form substantially as follows: I, ——, do solemnly swear that the schedule and inventory now delivered by me contain a full, perfect, and true discovery of all the estate, real, personal, and mixed, goods and effects, to me in any way belonging; all such debts as are to me owing, or to any person or persons in trust for me, and all securities and contracts, and contracts whereby any money may hereafter become payable, or any benefit or advantage accrue to me or to my use, or to any other person or persons in trust for me; that I have no lands, money, stock, or estate, reversion or expectancy besides that set forth in my schedule and inventory; that I have, in no instance, created or acknowledged a debt for a greater sum than I honestly and truly owe; that I have not, directly or indirectly, sold, or otherwise disposed of, or concealed any part of my property, effects, or contracts; that I have not in any way compounded with my creditors whereby to secure the same, or to receive, or to expect any profit or advantage therefrom, or to defraud or deceive any creditor to whom I am indebted in any manner. So help me God.*

(*a*) The oath must be taken by the insolvent in person. The attorney may sign the petition, *Brewster* v. *Ludekins*, 19

find the property. It is not necessary that every article of clothing shall be set out. The wearing apparel should be so set forth that the assignee may be enabled to ascertain whether he can claim it or not: *In re Malcolm*, 4 Law Rep. 488.

2. A partner should state what his interest is, but he need not enumerate the effects in detail: *In re Norcross*, 1 N. Y. Leg. Obs. 100.

3. The term assets includes: A claim for unliquidated damages: *In re Orne*, 1 B. R. 57; property conveyed to petitioner in fraud of the grantor's creditors: *In re O'Bannon*, 2 Id. 15; an interest, expectant, in a life estate: *In re Bennett*, 2 Id. 181; an insurance on petitioner's life, in favor of his wife, on which he has paid premium after his insolvency: *In re Erben*, 2 Id. 181; petitioner's interest in credits due a firm of which he is a member: *Moore* v. *Rosenberger*, 7 Phila. 576.

4. The money advanced by the petitioner as security for fees to the register, the clerk and marshal: Anon., 1 B. R. 123; an interest under a will: *In re Connell*, 3 Id. 443.

5. The following have been held not to be assets: An interest in profits as compensation for services to a firm: *In re Beardsley*, 1 B. R. 304; money invested in the name of a wife, which has been earned by her: *In re Hammetsh*, 2 Id. 12; a claim against another for falsely recommending another as worthy of trust: *Crockett* v. *Jewell*, 2 Id. 208; property vested in a receiver appointed by a state court: *In re Freeman*, 4 Id. 64.

* U. S. R. S., Sec. 5017.—The schedule and inventory must be verified by the oath of the petitioner, which may be taken either before the district judge, or before a register, or before a commissioner of the circuit court.

SEC. 6. Upon receiving and filing such petition, schedule, and inventory, the Court shall make an order declaring the petitioner insolvent, and directing the Sheriff of the county to take possession of all the estate, real and personal, of the debtor, except such as may be by law exempt from execution, and of all his deeds, vouchers, books of account and papers,[a] and to keep the same safely until the appointment of an assignee. Said order shall further forbid the payment of any debts and the delivery of any property belonging to such debtor, to him, or for his use, and the transfer of any property by him; and shall further appoint a time and place for a meeting of the creditors, to prove their debts and choose one or more assignees of the estate, which shall not be less than thirty days[b] after the making of said order, and shall designate a newspaper or newspapers of general circulation in which publication thereof shall be made. Upon

Cal. 162, but the insolvent must sign the schedule: *Wilson* v. *His Creditors*, 32 Id. 406.

(*a*) The deposit of books, vouchers, and other evidences of debt is one of the highest importance to the assignee as well as the creditors, and it seems that this requirement should be strictly complied with. Hence, where the debtor attempted to excuse his failure to make the deposit, by proof that some weeks prior to the filing of his petition he had sold his books, and, therefore, that they were no longer under his control, it was held that the excuse was insufficient, and that an application for discharge should be denied. In the same case, the court says, that it should be specified in the opposition of creditors, or an order or notice should be given the debtor requiring him to produce, and that an order dismissing his application for a discharge, before such opportunity was afforded, was erroneous: *Moore* v. *His Creditors*, 19 Cal. 691.

A more serious consequence, arising from failure to make the deposit, is, that the unexplained omission is set down as a concealment for the advantage of petitioner, and therefore a fraud upon the creditors: *Schloss* v. *His Creditors*, 31 Id. 205.

(*b*) The first publication should be at least thirty days before the day fixed for the creditors to appear: *McDonald* v. *Katz*, 34 Cal. 167.

the granting of said order, all proceedings against the said insolvent shall be stayed.* *

SEC. 7. A copy of said order shall immediately be published* by the Clerk of said Court in the newspaper or news-

(c) The order staying proceedings operates by its own force from its date, and no notice need be given of it to a sheriff with a writ against an insolvent: *Tufts* v. *Morlove*, 14 Cal. 47.

(a) The publication of this notice is of equal importance with the petition and schedule, in this: that it is jurisdictional, and everything bearing upon that question must appear affirmatively, as there can be no intendments in favor of the jurisdiction: *McDonald* v. *Katz*, 31 Cal. 168.

While it has been said that the petition, with schedule attached, is the complaint, the publication of notice is the summons, *Bennett* v. *His Creditors*, 22 Id. 38, and *at the most*, jurisdiction is acquired by filing the petition and giving the notice: *Brewster* v. *Ludekins*, 19 Id. 162.

It makes no difference that the notice was published for the time required, if the creditors do not have full thirty days from the date of the first publication to the day of meeting, it is insufficient: *McDonald* v. *Katz*, *supra*.

The order for creditors to show cause, the order for the clerk to give notice of the time and place of meeting, and the order staying proceedings may be, and in practice usually are, combined and may be made by the judge at chambers: *Flint* v. *Wilson*, 36 Id. 24; C. C. P. 166–1004.

Proof of publication may be by the affidavit of the publisher: *Schloss* v. *His Creditors*, 31 Cal. 201; *Barrett* v. *Carney*, 83 Id. 530.

Section 30 of the Practice Act (relating to service of

* U. S. R. S., Sec. 5019.—Upon the filing of such petition, schedule, and inventory, the judge or register shall forthwith, if he is satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant, to be signed by such judge or register, directed to the marshal for the district, authorizing him forthwith, as messenger, to publish notices in such newspapers [as the marshal shall select, not exceeding two]; to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor; and to give such personal or other notice to any persons concerned as the warrant specifies. [But whenever the creditors of the bankrupt are so numerous as to make any notice, now required by law, to them, by mail or otherwise, a great and disproportionate expense to the estate, the court may, in lieu thereof, in its discretion, order such notice to be given by publication, in a newspaper or newspapers, to all such creditors whose claims, as reported, do not exceed the sums, respectively, of fifty dollars.]

papers designated therein, as often as the newspaper is printed before the meeting of creditors, and be served by the Clerk forthwith by United States mail,[b] postage prepaid, or personally,[c] on all creditors named in the schedule. The order of adjudication shall direct the publication thereof in a newspaper published in the county, or city and county, in which the petition is filed, if there be one, and if there be none, in a newspaper published nearest to such county, or city and county; *provided*, that no order of adjudication upon creditors' petition shall be entered, unless there first be deposited with the Clerk, in addition to the usual cost of commencing said proceedings, a sum of money sufficient to defray the cost of the publication ordered by

summons by publication), being in derogation of the common law, must be strictly construed and pursued: *Ricketson* v. *Richardson*, 26 Id. 149; *Forbes* v. *Hyde*, 31 Id. 342; *People* v. *Hober*, 20 Id. 81; *Jordan* v. *Giblin*, 12 Id. 100.

No presumption in favor of jurisdiction will be indulged: *McMinn* v. *Whalan*, 27 Id. 309.

If some of the publications of a summons, including the last, are made on Sunday, in the regular issues of the paper, it does not vitiate the service: *Savings and Loan Society* v. *Thompson*, 32 Id. 347. When published it disclosed certain discrepancies of a purely literal character held sufficient: *Sharp* v. *Dangney*, 33 Id. 505. Proof of publication can only be made by the affidavit of the printer, his foreman or principal clerk: *Steinbock* v. *Luse*, 27 Id. 295. If made by publisher and proprietor, held sufficient: *Sharp* v. *Dangney*, 33 Id. 505; *Young* v. *Porter*, 37 Id. 458. If there is but one clerk the affidavit need not state that he is the principal clerk: *Gray* v. *Palmer*, 9 Id. 616.

(*b*) The affidavit of deposit of summons in a post-office need not state that there is a communication by mail between the place of deposit and the place to which the packet was addressed, nor that the post-office was a United States post-office: *Sharp* v. *Dangney*, 33 Cal. 505. The failure to deposit in the post-office a copy of the complaint and summons directed to the minor is not cured by the appearance of the mother in her own behalf: *Gray* v. *Palmer*, 9 Id. 616.

(*c*) If personal service is attempted, see Code C. P. 410, 411, title Summons, service of. See also service by telegraph, Id. 1017.

the Court, and ten cents for each copy, to be mailed to or served on the creditors, which latter sum is hereby constituted the legal fee of the Clerk for the mailing or service required in this section.*

* U. S. R. S., Sec. 5032.—The notice to creditors under warrant shall state: 1, that a warrant in bankruptcy has been issued against the estate of the debtor; 2, that the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law; 3, that a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.

1. The proceedings in bankruptcy are in no just sense *ex parte* in their character, for notice is required to be given to the creditors either personally or by publication: *Lathrop* v. *Stewart*, 5 McLean, 167.

2. After the public notice required by statute has been given, creditors must be treated as having notice of the proceedings: *Smith* v. *Brinkerhoff*, 6 N. Y. 305.

3. The omission to publish the notice in one of the newspapers designated by the warrant is such a defect as will make all proceedings founded thereon, and subsequent thereto, irregular and voidable: *In re Hall*, 2 B. R. 192.

4. The notice must be served on foreign creditors as well as those who reside in the United States: *In re Hayes*, 1 B. R. 21.

ARTICLE III.

INVOLUNTARY INSOLVENCY.

SECTION
8. Petition of creditors; Residents of the State to be; Amount of claims necessary; Petition to be filed; Verified, to be; Contents of petition; Amendment of petition; Loans, certain, not to be invalidated; Bond to accompany petition; Conditions of bond; Additional bond to be filed.
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e.—Agent, who is.
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5.—Debts barred by statute of limitations.
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SECTION
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12. Default of respondent; Order of court on respondent's default; Respondent to file inventory and schedule.
13. Dismissal of proceedings; Costs to be recovered on dismissal.
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SEC. 8. An adjudication of insolvency may be made on the petition of five or more creditors, residents of this State, whose debts or demands accrued in this State, and amount in the aggregate to not less than five hundred dollars; *provided*, that such creditors, or either of them, have not become creditors by assignment within thirty days prior to

the filing of said petition. Such petition[a] must be filed in the Superior Court of the county, or city and county, in which the debtor resides or has his place of business, and must be verified by at least three of the petitioners, setting forth that such person is about to depart from the State, with intent to defraud[b] his creditors; or being absent from the State with such intent, remains absent; or conceals himself to avoid the service of legal process;[c] or conceals or is removing any of his property, to avoid its being attached or taken on legal process; or being insolvent, has suffered his property to remain under attachment, or legal process, for four days; or has confessed, or offered to allow judgment in favor of any creditors; or willfully suffered

(*a*) Facts only must be stated. This means the facts as contradistinguished from the law, from argument, from hypothesis, and from the evidence of the facts: *Green* v. *Palmer*, 15 Cal. 410.

(*b*) A bill, to obtain relief on the ground of fraud, must state the facts constituting the fraud: *Gushee* v. *Leavitt*, 5 Cal. 160; *Kent* v. *Snyder*, 30 Id. 666; *Castle* v. *Bader*, 23 Id. 75; *Meeker* v. *Harris*, 19 Id. 278; *Gifford* v. *Carvill*, 29 Id. 589; *People* v. *Supervisors of San Francisco*, 27 Id. 656.

When a party relies upon fraud, either to support his cause of action or in defense, he must set up the facts which constitute the fraud: *Capuro* v. *Builders' Ins. Co.*, 39 Id. 123; *O. & V. R. R. Co.* v. *Plumas County*, 37 Id. 354.

(*c*) Section four hundred and twelve of the Code of Civil Procedure provides the summons in a civil action may be served by publication in cases where the defendant * * * "conceals himself to avoid the service of summons."

It has been held that where the affidavit states that diligent search has been made for the defendant, and that he conceals himself to avoid the service of process, it is sufficient for an order for the service by publication: *Anderson* v. *Parker*, 6 Cal. 201. Repeating the language of the statute is insufficient: *Rickertson* v. *Rickertson*, 26 Id. 149.

An affidavit for publication stated: Affiant had inquired of Fogg, who is an intimate friend of defendant, as to his whereabouts, but Fogg was unable to inform him, and that plaintiff did not know where defendant could be found within the state: *Held*, insufficient. A publication made upon such an affidavit will not give the court jurisdiction of the person of defendant: *Swan* v. *Chose*, 12 Id. 283.

judgment to be taken against him by default; or has suffered, or procured his property to be taken on legal process, with intent to give a preference to one or more of his creditors; or has made any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, with intent to delay, defraud,[d] or hinder his creditors, or in contemplation of insolvency, has made any payment, gift, grant, sale, conveyance, or transfer of his estate, property, rights, or credits; or has been arrested and held in custody by virtue of any civil process of Court founded on any debt or demand, and such process remains in force, and not discharged by payment, or otherwise, for a period of four days; or being a merchant or tradesman, has stopped or suspended, and not resumed payment within a period of forty days after maturity of any written acknowledgment of indebtedness, unless the party holding such acknowledgment has, in writing, waived the right to proceed under this subdivision; or being a bank or banker, agent,[e] broker, factor,[f] or commission merchant,[g] has failed for forty days to pay any moneys deposited with or received by him in a fiduciary capacity,[h] upon demand of payment, excepting savings and loan banks, or associations, who loan the money of their

(*d*) See notes to sec. 55.

(*e*) Secs. 2026, 2295, Civil Code.

(*f*) Secs. 2367, 2026, Civil Code.

(*g*) One who buys and sells goods for another on commission, or one who acts as agent in buying and selling, and receives a rate per cent. as his commission, is a commission merchant: Worcester's Dict.

(*h*) A complaint alleging that defendant collected and received certain money as the agent or attorney of the plaintiff, and had embezzled and converted the money to his own use, and praying that he be adjudged guilty of fraud, and for judgment and execution against his person and property, is insufficient to sustain a verdict convicting the defendant of fraud. The complaint should state the facts that constitute the fiduciary capacity, as well as its nature and extent. Where the character or capacity in which a party is alleged to have acted is essential to the charge of fraud, that character or capacity must be averred in direct and positive terms, or the charge must fall: *Porter* v. *Herman*, 8 Cal. 619.

stockholders and depositors on real estate, and provide in their by-laws for the repayment of such deposits. The petitioners may, from time to time, amend and correct the petition, so that the same shall conform to the facts, by leave of the Court before which the proceedings are pending, but nothing in this section shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith upon a security taken in good faith on the occasion of the making of such loan; the said petition shall be accompanied by a bond with two sureties in the penal sum of at least five hundred dollars, conditioned that if the debtor should not be declared an insolvent, the petitioners will pay all costs and damages, including a reasonable attorney's fee, that the debtor may sustain by reason of the filing of said petition. The Court may, upon motion, direct the filing of an additional bond with different sureties when deemed necessary.*

* U. S. R. S., Sec. 5021.—That any person residing, and owing debts, as aforesaid, who, after the passage of this act, shall depart from the state, district, or territory of which he is an inhabitant, with intent to defraud his creditors; or, being absent, shall, with such intent, remain absent; or shall conceal himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this act; or shall conceal or remove any of his property to avoid its being attached, taken, or sequestered on legal process; or shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors; or who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of the United States, or of any state, district, or territory, within which such debtor resides, or has property, founded upon a demand in its nature provable against a bankrupt's estate, under this act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of the United States or of such state, district, or territory, applicable thereto, for a period of twenty days, or has been actually imprisoned for more than twenty days in a civil action founded on contract for the sum of one hundred dollars or upwards; or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or confess judgment, or give any warrant to confess judgment, or procure his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this act; or who, being a bank, banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or who, being a bank, banker, broker, merchant, trader, manufacturer, or miner, has stopped or suspended and not resumed payment, within

a period of forty days, of his commercial paper (made or passed in the course of his business as such), or who, being a bank or banker, shall fail for forty days to pay any depositor upon demand of payment lawfully made, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one third of the debts so provable. *Provided*, That such petition is brought within six months after such act of bankruptcy shall have been committed. [*Provided*, also, that no voluntary assignment by a debtor or debtors of all his or their property, heretofore or hereafter made in good faith for the benefit of all his or their creditors, ratably and without creating any preference, and valid according to the law of the state where made, shall of itself, in the event of his or their being subsequently adjudicated bankrupts in a proceeding of involuntary bankruptcy, be a bar to the discharge of such debtor or debtors.] And the provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the first day of December, 1873, as well as to those commenced hereafter. And in all cases commenced since the first day of December, 1873, and prior to the passage of this act, as well as those commenced hereafter, this court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor, by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one fourth in number and one third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court (if satisfied that the admission was made in good faith) shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding, in cases heretofore commenced, twenty days, and, in cases hereafter commenced, ten days, within which other creditors may join in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and, in cases hereafter commenced, with costs. And if such person shall be adjudged a bankrupt, the assignee may recover back the money or property so paid, conveyed, sold, assigned, or transferred contrary to this act: *Provided*, That the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy. And the petition of creditors under this section may be sufficiently verified by the oaths of the first five signers thereof, if so many there be. And if any of said first five signers shall not reside in the district in which such petition is to be filed, the same may be signed and verified by the oath or oaths of the attorney or attorneys, agent or agents, of such signers. And in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose re-

spective debts do not exceed two hundred and fifty dollars shall not be reckoned. But if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purposes aforesaid."

1. The amendment to section thirty-five (R. S., sec. 5021), requiring a fixed proportion of creditors to join in a petition for the adjudication of a person a bankrupt, has given rise to much complicated litigation, and has weakened the efficacy of the act. The allegation in an involuntary petition that the petitioners constitute the requisite proportion of creditors, need be upon belief only, without charging either information or knowledge: *Re Mann*, 14 B. R. 572.

2. Creditors whose claims are under two hundred and fifty dollars, are not to be counted in computing the number who must unite in an involuntary petition, if one fourth of the creditors, whose claims are above that sum, join in the petition: *Re Woodford*, 13 B. R. 575; *Re Currier*, 13 Id. 68; *Re Hadley*, 12 Id. 366; *Re Bergeron*, 12 Id. 385; *Re Broich*, 15 Id. 1. *Contra*, *Re Hymes*, 10 Id. 433. In computing the amount or value, all the claims must be reckoned, and the petitioners must constitute one third of all: *Re Broich*, 15 Id. 11; *Re Woodford*, 13 Id. 575; *Re Currier*, 13 Id. 68; *Re Hadley*, 12 Id. 366. *Contra*, *Re Hymes*, 10 Id. 434. If one fourth of all creditors in number, irrespective of amount of their claims, join in the petition, and one third in amount of the debts, the requirements of the section are fulfilled: *Re Hall*, 15 Id. 31; *Re Currier*, *supra*.

3. In an involuntary proceeding against a separate partner, creditors of the partnership are to be counted in ascertaining the number and value: *Re Lloyd*, 15 B. R. 257; *Re Price*, 3 Dillon, 514.

4. Secured creditors are not to be reckoned in computing the proportion of creditors who must join in an involuntary petition: *Re Green Pond R. R. Co.*, 13 B. R. 118. "Debts provable under the act," means only unsecured debts: Id.; *Re Frost*, 11 B. R. 69. If a secured creditor joins in a petition for adjudication in involuntary bankruptcy, he surrenders his security: *Re Broich*, 15 Id. 11. If a creditor holds partial security for his claims, the court will ascertain the value of the security, and the creditor's claim will be computed for the excess over the security, in determining the question whether the requisite number and value of creditors have joined: Id.

5. Debts barred by limitation are to be disregarded: *Re Noesen*, 12 B. R. 422.

6. Fraudulently preferred creditors of a debtor may be disregarded in estimating whether the requisite proportion of creditors have joined in a petition for adjudication in bankruptcy: *Re Israel*, 12 B. R. 204; *Re Currier*, 13 Id. 68; *Michaels* v. *Post*, 12 Id. 152. A creditor who was induced to discharge his debtor, without consideration, from the payment of the debt due him, by the fraud of another creditor, may file a petition in bankruptcy against the debtor on such debt: *Michael* v. *Post*, 12 Id. 152.

7. In ascertaining the amount of debts joined in the petition for adjudication, interest on the debts should stop on all the claims simultaneously, and, for purposes of such an inquiry, interest should stop at the date of the filing of the petition: *Re Broich*, 15 B. R. 11.

8. In a case of involuntary bankruptcy, the burden of proof is upon the petitioning creditors: *Re Oregon Printing Co.*, 13 B. R. 503. A party is insolvent when he is unable to pay his debts as they become due: Id. *Semble*, that if his property, put up upon reasonable notice for sale, where it exists under the circumstances of the case, will bring cash enough to pay his debts, he is not insolvent: Id. A petitioning creditor is not required to make full and satisfactory proof of the debtor's insolvency, but may offer proof tending to show his insolveney, and the debtor must then explain the evidence, if possible: Id. A solvent debtor may pay any or all of his debts, although proceedings in bankruptcy are pending against him: Id. A defense which has been stricken out may be offered in evidence as an admission: Id. No particular or specific evidence of intent to prefer is necessary when a payment is

made by an insolvent debtor, for the act itself is evidence of the intent. But the law will not presume an intent to prefer when the debtor is not aware of his insolvency; but it is incumbent on him to show that fact: Id.

9. A *prima facie* case must be made by the petition as to the number and value of creditors, this being a material and substantial fact, before the court can acquire jurisdiction to grant an order to show cause: *Re Burch*, 10 B. R. 150.

10. The debtor's denial, that the requisite number have joined in the petition, must be verified: *Re Steinman*, 6 Ch. L. N. 338; *Re Hymes*, 10 B. R. 434. The list of creditors filed by the debtor should be verified, in like manner, by the debtor's oath: Id. Where petitions were filed against an alleged debtor, and the debtor had made a denial, and had demanded a jury trial, and had since filed a demurrer, he was required to file a list of his creditors, and of the amount of their claims: *Warren Sav. Bank* v. *Palmer*, 10 B. R. 239.

11. A person of unsound mind can not commit an act of bankruptcy: *Re Marvin*, 1 Dill. 178; *Re Weitzel*, 14 B. R. 466. A lunatic may be proceeded against in bankruptcy: *Re Weitzel*, Id. But see *Re Murphy*, 10 Id. 48. A voluntary petition for adjudication may be filed on behalf of a lunatic by his guardian: *Re Pratt*, 6 Id. 276. Where a state court appointed receivers of an insolvent corporation, and a petition was subsequently filed by creditors against the corporation to have it adjudged bankrupt, the court so adjudged: *Re Independent Ins. Co.*, 6 Id. 169; *Re Merchants' Ins. Co.*, Id. 43; *Re Green Pond R. R. Co.*, 13 Id. 118.

12. The restrictions in section 5014 as to place where proceedings must be had apply to this section: *Re Leighton*, 5 B. R. 95.

13. A general assignment without preferences, whether made under a statute law of voluntary assignments or at common law for benefit of creditors, is an act of bankruptcy, and is void as against an assignee in bankruptcy, because it is a conveyance which "defeats the operation of the act:" *Re Smith*, 3 B. R. 377; *Re Randall*, Id. 18; *Re Goldschmidt*, Id. 165; *Re Pierce & Holbrook*, Id. 258; *Hardy* v. *Bininger*, 4 Id. 262; *Re Union Pac. R. R. Co.*, 10 Id. 178; *Re Spicer* v. *Ward*, 3 Id. 512; *Re Burt*, 1 Dill. 439. For an elaborate discussion of the question, see *Globe Ins. Co.* v. *Cleveland Ins. Co.*, 14 B. R. 311. *Contra*, *Langley* v. *Perry*, 2 Id. 596; *Farrin* v. *Crawford*, 2 Id. 602; *Re Marter*, 12 Id. 185. But an assignment which is invalid under the statute laws of the state, is not an act of bankruptcy: *Re Mendelsohn*, Id. 533.

14. The law requires that the person suspending payment of his paper, shall have been a trader at the time of making the note: *Re Jack*, 13 B. R. 296. Where a manufacturing firm dissolved, and one partner purchased the other partner's interest in the machinery and business, and gave his notes for the purchase, which notes were negotiated, the holders of which petitioned the payee into bankruptcy, it was held that it was not commercial paper of the manufacturer, made and passed in the course of his business as such: *Re Lanz*, 14 Id. 159. Note given for money borrowed is not commercial paper: *Re McDermot Bolt Co.*, 3 Ben. 369. Any person who has fraudulently stopped payment of his debts generally, may be adjudged a bankrupt; it need not necessarily be commercial paper. This is a *dictum* in *Re Hadley*, 12 Id. 366. See, also, *Re Hall*, 1 Dill. 586; *Re Hercules Mutual Life Ins. Society*, 6 B. R. 338.

15. Allowing fictitious judgments to be entered is procuring property to be taken on legal process: *Re Schick*, 2 Ben. 5. Petitioning creditors who hold preferences can not allege the preferences to them as an act of bankruptcy; they are estopped: *Re Williams*, 14 B. R. 132. So, also, if they hold a note which the debtor has no chance to pay, for forty days, they are estopped from alleging the non-payment as an act of bankruptcy: Id.

16. A petition will not be dismissed because the depositions in support thereof are defective. Supplemental depositions may be filed on motion: *Cunningham* v. *Cady*, 13 B. R. 526. When the depositions are defective, an order to show cause will be set aside, but an *alias* order may be issued on supplemental depositions: *Cunningham* v. *Cady*, Id. A defective affidavit to a petition may, upon motion, be amended: *Re Sargent*, Id. 144. Where the act of bankruptcy, alleged in the petition, is a fraudulent conveyance, the deposition in support of such allegation must show the fraudulent intent of

SEC. 9. Upon the filing of such creditors' petition, the Court shall issue an order requiring such debtor to show cause, at a time and place to be fixed by said Court, why he should not be adjudged an insolvent debtor, and at the same time, or thereafter, upon good cause shown therefor,[a] said Court may make an order forbidding the payment of any debts,[b] and the delivery of any property belonging to such

(*a*) Injunctions to restrain injuries in the nature of waste should not be issued before a hearing on the merits, except in cases of urgent necessity: *Hicks* v. *Mitchell*, 15 Cal. 107; *Mose* v. *Massini*, 32 Id. 594.

An injunction ought not to be granted unless equitable circumstances, beyond the mere allegation of irreparable injury, be showing, as insolvency, impediments to a judgment at law or to adequate legal relief, or a threatened destruction of property, or the like: *Burnett* v. *Whitesides*, 13 Id. 156.

A party against whom an injunction has been issued is not bound to obey it until due service thereof on him. Verbal notice is not sufficient, unless the party was in court when the order was made. *Elliott* v. *Osborne*, 1 Id. 396.

(*b*) An injunction should not be granted to restrain the defendant from collecting debts that are due, when no provision is made for the appointment of a receiver, or otherwise, for their collection: *De Godey* v. *De Godey*, 39 Cal. 158.

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the debtor: *Cunningham* v. *Cady*, Id. 526. A charge in the alternative "that the debtor is insolvent, or in contemplation of bankruptcy," is not sufficient: *Re Hanibel*, 15 Id. 233. The petition in involuntary proceedings for an adjudication need not contain a detailed statement of the petitioner's demand; it should be so far stated that the court may see that it is a provable debt: *Re Hadley*, 12 Id. 366. It is not necessary that proof of the act of bankruptcy charged, should appear in the petition; but it must appear in the deposition to the act: Id. Where the act of bankruptcy charged is a payment by way of preference, it is not necessary to allege that it was in fraud of the provisions of the act: Id. Depositions to acts of bankruptcy should be made upon the personal knowledge of the deponent: Id. The allegation of stoppage may be in two forms: The pleader may set up a general stoppage of payment, without describing any paper, or he may aver the stoppage of a particular piece of commercial paper, and rely upon it as *prima facie* evidence of a general stoppage: *Re Hadley*, Id.; *McLean* v. *Brown*, 4 Id. 585; *Re Hercules Mut. Life Ins. Society*, 6 Id. 338; *Re McNaughton*, 8 Id. 44; *Re Wilson*, Id. 396. If the stoppage of a particular piece is relied upon, it must be described: *Re Randall*, 3 Id. 18; S. C., Deady, 524. Allegation of sufficiency of number may be amended: *Re McKibben*, 12 Id. 97.

17.[a] A party may purchase a claim in good faith in order to join in an involuntary petition and make the necessary number: *Re Woodford*, 13 B. R. 575. If the sale of a claim is void for fraud or want of consideration, the claim is to be deemed to belong to the assignor: *Re Woodford*, Id. It is not necessary that the larger creditors shall be requested to sign the petition, and refuse, before recourse can be had to the smaller ones: *Re Currier*, Id. 68.

debtor to him or for his use, or the transfer of any property by him.' *

SEC. 10. A copy of said petition, with a copy of the order to show cause, shall be served on the debtor, in the same manner as is provided by law for the service of sum-

(c) Title VII., Chap. III., C. C. P., Secs. 2422, 2423, C.C.

* U. S. R. S., Sec. 5024.—Upon the filing of the petition authorized by the preceding section, if it appears that sufficient grounds exist therefor, the Court shall direct the entry of an order requiring the debtor to appear and show cause, at a Court of Bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted. The Court may also, by injunction, restrain the debtor, and any other person, in the mean time, from making any transfer or disposition of any part of the debtor's property not excepted by this title from the operation thereof, and from any interference therewith; and if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or to make any fraudulent conveyance or disposition thereof, the Court may issue a warrant to the marshal of the district, commanding him to arrest and safely keep the alleged debtor, unless he shall give bail to the satisfaction of the Court for his appearance from time to time, as required by the Court, until its decision upon the petition, or until its further order, and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the Court.

1. The averments of the petition for an injunction should be positive, and not on information and belief: *In re Bloss*, 4 B. R. 147.

2. The injunction may be addressed to the debtor and all other persons who may attempt to transfer or interfere with his property. The fact that such other persons are not named in the order makes no substantial difference: *In re Lady Bryan Mining Co.*, 6 B. R. 252.

3. A party is liable for breach of an injunction after notice of its having been obtained, although the order has not been served upon him. All that is required is that the defendant should have knowledge of the order for the injunction, and the Court may punish the violation of the order, though the injunction be not served, if it appear that the defendant knew of its existence. The belief that the order has been made and concealment to avoid service are sufficient. The right to indemnify for the damages occasioned by a breach of the injunction can not be in any way affected by the fact that the defendant acted under the advice of counsel. The fine should be equal in amount to the actual loss and expenses occasioned by his misconduct: *In re Feeny*, 4 B. R. 233.

4. The restraining power of the Court is limited in point of time to the period of time expressed by the words "in the mean time," and those relate manifestly to the period of time between the entering of the order to show cause and the time specified therein for the hearing. The most extended construction that can be given to these words is that they are intended to cover the whole period up to such time as a hearing and adjudication shall be had upon the petition for an adjudication in bankruptcy. There is no warrant whatever for extending their meaning beyond that. Acts which are done after the restraining power of the injunction has ceased to operate do not make the parties liable for a contempt: *In re Moses*, 6 B. R. 181.

5. If the contempt committed by the bankrupt in collecting money from his debtors is not of a willful character, it may be purged by turning everything over to the assignee, and will not then be visited by punishment, either personal or pecuniary: *In re J. P. Hayden*, 7 B. R. 192.

mons in civil actions,[a] but such service shall be made at least ten days before the time fixed for the hearing; *provided*, that if, for any reason, the service is not made, the order may be renewed, and the time and place of hearing changed, or by a supplemental order by the Court; or if such debtor can not be found, or his place of abode ascertained, service shall be made by publication, as is provided in the Code of Civil Procedure for service of summons by publication.[bc]*

SEC. 11. At the time fixed for the hearing of said order to show cause, or such other time as it may be adjourned to,

(*a*) In the service of summons and in the return, the provisions of the statute must be shown to have been substantially observed and followed by the officer, otherwise the proceedings can not be supported upon a direct appeal: *People* v. *Berral*, 43 Cal. 100. Mere irregularity in the service does not render a judgment void for want of jurisdiction: *Drake* v. *Duvenick*, 45 Id. 455.

(*b*) Where service is attempted in a mode different from the course of the common law, the statute must be strictly pursued to give jurisdiction: *Jordan* v. *Giblin*, 12 Cal. 100.

(*c*) See notes to sections 7 and 8.

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*U. S. R. S., Sec. 5025.—A copy of the petition and order to show cause shall be served on the debtor, by delivering the same to him personally, or leaving the same at his last or usual place of abode; or, if the debtor can not be found, and his place of residence can not be ascertained, service shall be made by publication in such manner as the judge may direct. No further proceedings, unless the debtor appears and consents thereto, shall be had until proof has been given, to the satisfaction of the court, of such service or publication; and if such proof is not given on the return day of such order, the proceedings shall be adjourned, and an order made that the notice be forthwith so served or published. [And if, on the return day of the order to show cause as aforesaid, the court shall be satisfied that the requirement of section thirty-nine of said act, as to the number and amount of petitioning creditors, has been complied with; or if, within the time provided for in section thirty-nine of this act, creditors sufficient in number and amount shall sign such petition so as to make a total of one fourth in number of the creditors, and one third in the amount of the provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise it shall dismiss the proceedings, and, in cases hereinafter commenced, with costs.]

1. Where a corporation has been dissolved by means of an order passed by a state court, in an action instituted by the state attorney-general, the case is one where the debtor proceeded against can not be found, on account of the dissolution, and the service of the order to show cause should be made by publication: *In re Washington Marine Ins. Co.*, 2 B. R. 648.

2. When the order directs that a copy of the petition and order shall be served upon the president of a corporation, if the president can not be found,

the debtor may demur to the petition for the same causes as is provided for demurrer in other cases by the Code of Civil Procedure.[a] If the demurrer be overruled, the debtor shall have ten days thereafter in which to answer the petition.[b] If the debtor answer the petition, such answer shall contain a specific denial of the material allegations of the petition controverted by him,[c] and shall be verified[d] in the same manner as pleadings in civil actions; and the issues raised thereon may be tried with or without a jury,[e] according to the practice provided by law for the trial of civil actions.*

(*a*) Sections 430–434, C. C. P.
(*b*) Section 472, C. C. P.
(*c*) Section 437, C. C. P.
(*d*) Section 446, C. C. P.
(*e*) Title VIII., C. C. P.

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a new order may be issued, upon the filing of an affidavit setting forth such absence, directing the service to be made on the cashier, and such service will be valid: *Platt* v. *Archer*, 6 B. R. 465.

3. The words "if such debtor can not be found," mean, "if he can not be found within the jurisdiction of the court." The marshal is not compelled to serve him in another jurisdiction, even when he knows precisely where he may be found. The words "not found," have a well-settled technical meaning, and mean not found in the jurisdiction of the court. If the debtor can not be found within the jurisdiction of the court, that does not authorize service out of the jurisdiction. In such case, other modes of service must be resorted to. A corporation can have no legal existence out of the bounds of the sovereignty by which it was created. It must dwell in the place of its creation. Service upon an officer of the corporation out of the district and state, or service at the supposed residence of the corporation, also out of the district and state, is defective and invalid. The fact that the corporation is also chartered by several states, does not make it one corporate body, on which service can be made at its residence in any one of those states. If the place of the debtor's residence can not be ascertained, as if there is no office of the corporation within the district, and no person representing the corporation, on whom service can properly be made, can be found in the district, then service by publication may and should be resorted to: *Ala. & Chat. R. R. Co.* v. *Jones*, 5 B. R. 97; *Stuart* v. *Aumueller*, 8 Id. 541.

4. The act is entirely silent as to the place of service. The mode only is designated. The act authorizes service by publication only when the party to be served can not be found, or his place of residence ascertained. When the debtor is found, personal service may be made upon him out of the district: *Stuart* v. *Hines*, 6 B. R. 416.

* U. S. R. S., Sec. 5026.—On such return day or adjourned day, if the notice has been duly served or published, or is waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demands, in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of the alleged bankruptcy. [Or, at the election of the debtor, the court may, in its discretion, award a *venire facias* to the marshal of the district, returnable within ten

SEC. 12. If the respondent shall make default, or if, after a trial, the issues are found in favor of the petitioners, the Court shall make an order adjudging that said respondent is, and was at the time of filing the petition, an insolvent debtor, and shall require said debtor, within such time as the Court may designate, to file in Court the schedule and inventory provided for in sections three and four of this act; and thereupon all proceedings shall be had in said matter in the same manner as if said debtor had voluntarily filed his petition.*

SEC. 13. If, upon such hearing or trial, the issues are found in favor of the respondent, the proceedings shall be dismissed, and the respondent shall recover costs from the

days before him for the trial of the facts set forth in the petition, at which time the trial shall be had, unless adjourned for cause. And unless, upon such hearing or trial, it shall appear to the satisfaction of said court, or of the jury, as the case may be, that the facts set forth in said petition are true, or if it shall appear that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens was the sole ground of the proceeding, the proceeding shall be dismissed, and the respondent shall recover costs; and all proceedings in bankruptcy may be discontinued on reasonable notice and hearing, with the approval of the court, and upon the assent, in writing, of such debtor, and not less than one half of his creditors in number and amount; or, in case all the creditors and such debtors assent thereto, such discontinuance shall be ordered and entered; and all parties shall be remitted, in either case, to the same rights and duties existing at the date of the filing of the petition for bankruptcy, except so far as such estate shall have been already administered and disposed of. And the court shall have power to make all needful orders and decrees to carry the foregoing provision into effect.] If the petitioning creditor does not appear and proceed on the return day, or adjourned day, the court may, upon the petition of any other creditor, to the required amount, proceed to adjudicate on such petition without requiring a new service or publication of notice to the debtor.

* U. S. R. S., Sec. 5028.—If upon the hearing or trial the facts set forth in the petition are found to be true, or if upon default made by the debtor to appear pursuant to the order, due proof of service thereof is made, the court shall adjudge the debtor to be a bankrupt, and shall forthwith issue a warrant to take possession of his estate.

U. S. R. S., Sec. 5029.—The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same manner and with similar proceedings to those hereinbefore provided for the taking possession, assignment, and distribution of the property of the debtor upon his own petition.

U. S. R. S., Sec. 5030.—The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days not exceeding five after the date of the order or notice thereof, as shall by the order be prescribed, to make and deliver, or transmit by mail, postpaid, to the messenger, a schedule of the creditors and an inventory [and valuation] of his estate in the form and verified in the manner required of a petitioning debtor.

petitioning creditors in the same manner as on final judgment in civil actions.

SEC. 14. If the debtor has failed to appear after service, personally or by publication, or is absent, or can not be found, the schedule and inventory may be prepared by the sheriff, or by the assignee, from the best information he can obtain.*

* U. S. R. S., Sec. 5031.—If the debtor has failed to appear in person, or by attorney, a certified copy of the adjudication shall be forthwith served on him by delivery or publication in the manner provided for the service of the order to show cause; and if the bankrupt is absent or can not be found, such schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain.

ARTICLE IV.

ASSIGNEES.

SECTION

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SEC. 15. At a meeting of the creditors, in open Court, those having proven their claims, by filing a verified statement showing the amount, nature, and security, if any, shall proceed to the election of one assignee. The assignee shall be a resident[a] of the county where the insolvent resides, or where he has carried on his business. In electing an assignee, the opinion of the majority in amount of claims shall

(*a*) See notes to sec. 2.

prevail. The Clerk of the Court shall keep a minute of the deliberations of said creditors, and of the election and appointment of an assignee, and enter the same upon the records of the Court. The asssignee shall file, within five days, unless the time be extended by the Court, with the Clerk, a bond, in an amount to be fixed by the Court, to the State of California, with two or more sufficient sureties, approved by the Court, and conditioned for the faithful performance of the duties devolving upon him. The bond shall not be void upon the first recovery, but may be sued upon from time to time by any creditor aggrieved, in his own name, until the whole penalty is exhausted. The sureties on such bond may be required to justify,[b] upon the application of any party interested, in the same manner as bail upon arrest in civil cases.[b] *

(*b*) Secs. 493–6, C. C. P.

* U. S. R. S., Sec. 5033.—At the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required.

U. S. R. S., Sec. 5034.—The creditors shall, at the first meeting held after due notice from the messenger in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of creditors who have proved their debts. If no choice is made by the creditors at the meeting, the judge, or if there be no opposing interest, the register, shall appoint one or more assignees. If an assignee, so chosen or appointed, fails within five days to express in writing his acceptance of the trust, the judge or register may fill the vacancy. All elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees, or order a new election.

U. S. R. S., Sec. 5036.—The district judge at any time may, and upon the request in writing of any creditor who has proved his claim shall, require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties; the bond shall be approved by the judge or register by his indorsement thereon, shall be filed with the record of the case, and enure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party. If the assignee fails to give the bond within such time as the judge or register orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

1. Until notice required by the warrant has been given, an assignee can not be chosen: *In re Hill*, 1 B. R. 16.

2. When the papers in the case show that notices of the issuing of the warrant, and of the first meeting of creditors, were duly published, and that a like notice containing the name of a particular creditor, as creditor, and a

SEC. 16. If, on the day appointed for the meeting, the creditors do not attend, or refuse to elect an assignee; or if, after election, the assignee shall fail to qualify within the proper time, it shall be lawful for the Court before which the said meeting may take place, to appoint an assignee and fix the amount of his bond.*

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statement of his residence, and of the amount of his debt, and the other matters required, was duly served by mail upon him, the fact that he did not receive it will not affect the regularity of the proceedings: *In re Stetson*, 3 B. R. 726.

3. New notice need only be given to remedy the defects or irregularities of the first notice. If the defect occurs in the publication, the service on the creditors being regular, a new notice must be published, but no new notices need be served on the creditors. If the defect is in the service of the notice, the publication being regular, a new notice must be served, but no new notice need be published: *In re Devlin and Hogan*, 1 B. R. 35.

4. All proceedings founded upon a defective notice are irregular and must be set aside: *In re Hall*, 2 B. R. 192.

5. The meeting should be organized at the hour named in the notice. If an assignee is not then elected, the meeting may be adjourned from day to day. The several adjournments will constitute but one meeting: *In re Norton*, 6 B. R. 297.

6. Any manner of voting, by which the choice of each creditor is clearly expressed, is sufficient. It may be taken by ballot or *viva voce*. It may be taken by calling the name of each creditor: *In re Lake Superior S. C. R. R. & I. Co.*, 7 B. R. 376.

7. No person has a right to be heard until he has proved his claim: *In re Hill*, 1 B. R. 16.

8. A creditor who proves his debt in due form, but retains the deposition in his own possession, is not a creditor who has proved his debt: *In re Sheppard*, 1 B. R. 439.

9. A creditor holding a security can not vote for assignee: *In re Davis & Son*, 1 B. R. 120; *In re Walton*, 1 Deady, 442; *In re Hanna*, 7 B. R. 502; *contra, in re Bolton*, 1 Id. 370. As he has security, the policy of the act is to leave his rights to be settled after there is an assignee to contest his claims to the property and protect the estate: *In re High*, 3 Id. 192.

10. A creditor holding a mortgage upon the homestead of the bankrupt has a right to prove his demand and vote: *In re Stillwell*, 7 B. R. 226.

11. A partner may cast the vote of his firm. The firm vote will only count as one vote. One of several joint creditors, not partners, can not act or vote without the consent of the others: *In re Perris*, 1 B. R. 163. An attorney at law and agents can not vote without procuring letters of attorney: Id.

12. A creditor can not change his vote after a final adjournment: *In re Scheiffer & Garrell*, 2 B. R. 591.

13. Where only one creditor appears and proves his debt, and there are no other debts proven, the right to choose an assignee belongs to the sole creditor who has proved his claim: *In re Hayns*, 2 B. R. 227.

14. An attorney for a creditor of the bankrupt may be assignee. Section 5035 declares who shall be ineligible as assignee. There is no other provision in the bankrupt act rendering a person ineligible for this provision: *In re Barrett*, 2 B. R. 533.

*U. S. R. S., Sec. 5041.—Vacancies caused by death or otherwise, in the office of assignee, may be filled by appointment of the court, or at its discretion by an election by the creditors, in the same manner as in the original choice of an assignee, at a regular meeting, or at a meeting called for the purpose, with such notice thereof in writing to all known creditors, and by such person, as the court shall direct.

SEC. 17. As soon as an assignee is appointed and qualified, the Clerk of the Court shall, by an instrument under his hand, and seal of the Court, assign and convey to the assignee all the estate, real and personal, of the debtor, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in insolvency, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee,[a] although the same is then attached on mesne process, as the property of the debtor, and shall dissolve any attachment made within one month next preceding the commencement of the insolvency proceedings.[b] Such assignment shall operate to vest in the assignee all the estate[c] of the insolvent debtor, not exempt by law from execution.[d] *

(*a*) The title of the assignee vests, by relation, at the date of the filing of the petition and the order staying proceedings: *Hastings* v. *Cunningham*, 39 Cal. 137; *Tufts* v. *Manlove*, 14 Id. 47. The title vests even if the property is not named in the schedule, and the assignee does not know of it until after discharge: *Philman* v. *Kennedy*, 48 Id. 201.

(*b*) See note to sec. 6.

(*c*) A franchise to construct a turnpike road and collect tolls, does not pass to the assignee: *People* v. *Duncan*, 41 Cal. 507.

(*d*) Sec. 690, C. C. P.

* U. S. R. S., Sec. 5044.—As soon as an assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached, on mesne process, as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings.

U. S. R. S., Sec. 5045.—There shall be excepted from the operation of the conveyance the necessary household and kitchen furniture, and such other articles and necessaries of the bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; also the wearing apparel of a bankrupt, and that of his wife and children, and the uniform, arms, and equipments of any person who is, or has been, a soldier in the militia, or in the

service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property, not included in the foregoing exceptions, as is exempted from levy and sale upon execution or other process, or order of any court, by the laws of the state in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount allowed by the constitution and laws of each state, as existing in the year eighteen hundred and seventy-one; and such exemptions shall be valid against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding. These exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee; and in no case shall the property hereby excepted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this title; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court.

U. S. R. S., Sec. 5046.—All property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent-rights, and copyrights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person, arising from contract or from the unlawful taking or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate; together with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had, if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee.

1. Property acquired by the bankrupt after the petition is filed, belongs to the bankrupt: *In re Patterson*, 1 B. R. 125.

2. A bankrupt has no right to reserve from his estate a sum of money sufficient to meet the expenses of procuring his discharge: *In re Thompson*, 13 B. R. 300.

3. Unless there is a discharge subsequently acquired, property remains liable to attachment or levy on execution: *Mays* v. *Manufacturers' National Bank*, 4 B. R. 446.

4. The moment the petition is filed, the bankrupt is civilly dead. From the day on which he files his petition, and until an assignee is appointed, no assignment of his estate can be made: *Johnson* v. *Geisriter*, 26 Ark. 44.

5. Parties must, in law, be deemed to have notice of the filing of the petition, and of its effects under the operation of the bankrupt law: *In re Grey*, 3 B. R. 529; *Perley* v. *Dale*, 38 Me. 558; *In re Lake*, 6 B. R. 542.

6. If a debtor, in good faith and without knowledge or notice of the proceedings in bankruptcy, pays the bankrupt a debt, he can be compelled to pay it over again to the assignee: *Mays* v. *Manufacturers' National Bank*, 4 B. R. 446.

7. The burden of proving that the property did belong to the bankrupt prior to the filing of the petition, rests upon the assignee: *Mays* v. *Manufacturers' National Bank*, 4 B. R. 446.

8. The assignment vests the property in the assignee, although it was not placed on the bankrupt's schedules: *Holbrook* v. *Dickenson*, 25 Ill. 543.

9. Real estate situated in a foreign country does not vest in the assignee, for a statutory conveyance can have no extraterritorial effect upon real estate; *Oakey* v. *Bennett*, 11 How. 33.

10. If, by the terms of a trust, the income of a certain fund is to be paid to the bankrupt or his wife, to be applied to the support of the bankrupt, his wife and children, the assignee is not entitled to any part thereof: *Durant* v. *Mass. Hosp. L. Ins. Co.*, 15 A. L. J. 436.

11. Property devised to trustees to hold until the devisee reaches a certain age, the estate passes to the assignee of the devisee although he has not reached that age at the time proceedings in bankruptcy were commenced: *Sandford* v. *Lackland*, 2 Dillon, 6.

12. Growing crops pass to the assignee, and should be placed upon the schedules as personal property: *In re Schumpert*, 8 B. R. 415.

13. A purchaser of firm property, at a sale under an execution against an individual partner, obtains only the interest of such partner in the surplus that may remain after the firm debts are paid: *Osborn* v. *McBride*, 16 B. R. 22.

14. A certificate of membership in a board of trade, where no profits are given the members further than what is derived from the incidental use made by a member of the privileges which his membership gives him, is a mere personal privilege, and does not pass to the assignee: *In re Sutherland*, 6 Biss. 526.

15. In cases of conditional sale, the ownership remains in the vendor until the final payment. Taking indorsed notes does not waive the condition that the title shall remain in the vendor until the purchase-money is paid: *In re Lyon*, 7 B. R. 182.

16. The assignee of the vendee can claim no greater rights than the vendee had: *In re Pusey*, 6 B. R. 40.

17. Where the vendor reserves the right to take possession of the chattels in case of the non-payment of the purchase-money, and does take possession before the commencement of the proceedings in bankruptcy, his title is valid, although the right was reserved in a mortgage, which was not recorded: *Field* v. *Baker*, 11 B. R. 415.

18. A covenant in the lease that the fixtures shall not be removed until the rent is paid, binds the assignee: *In re Morrow*, 2 B. R. 665.

19. The termination of all interest of the insured in the property defeats the policy. A transfer to an assignee in bankruptcy is a transfer of all the interest of the bankrupt. The fact that the bankruptcy is involuntary, or that the transfer is made by operation of law, is immaterial: *Starkweather* v. *Cleveland Ins. Co.*, 4 B. R. 341; *Torry* v. *Lorillard Ins. Co.*, 14 Id. 339.

20. A draft drawn for a part of a fund in bank is not an equitable assignment of the money, and does not entitle the holder to a priority of payment out of such money in the hands of the assignee: *Randolph* v. *Conby*, 11 B. R. 296.

21. A deed of the bankrupt, without any certificate of acknowledgment, is good against the assignee, for he is a grantee with full notice: *In re Kansas City Mfg. Co.*, 9 B. R. 76.

22. The assignee takes the property subject to all legal and equitable claims of others. He is affected by all the equities which can be urged against the bankrupt: *Cook* v. *Tullis*, 18 Wall. 332.

23. If the bankrupt is estopped his assignee is also estopped: *McKay* v. *Aldus*, 3 B. R. 50.

24. The assignee has no power to institute proceedings for the recovery of a statutory forfeiture claimed by the bankrupt, either prior or subsequent to proceedings against him in bankruptcy: *Bromley* v. *Smith*, 5 B. R. 152.

25. Articles of jewelry given to the wife previous to marriage and continuing in her use since, do not pass to the assignee: *In re Ludlow*, 1 N. Y. Leg. Obs. 322; *In re Kasson*, 4 Law Rep. 489.

26. Gifts from the husband to the wife of personal ornaments or others compatible with his circumstances at the time are her sole property as paraphernalia, and do not pass to the assignee; *In re Ludlow*, 1 N. Y. Leg. Obs. 322; *contra, in re Grost*, 2 Story, 311.

27. An insurance policy on the life of the bankrupt for the benefit of the wife, belongs to the wife, and if he is solvent when the premiums are paid the policy can not be assigned by him: *In re Bear & Steinburg*, 11 B. R. 46.

28. Transactions void as to creditors are equally void as against the assignee: *Kane* v. *Rice*, 10 B. R. 469.

29. When the statutes of a state expressly declare that a deed shall be void

as to creditors until and except from the time it is duly admitted to record, the title of the assignee will prevail against any claim under a deed, if it remained unrecorded when the petition in bankruptcy was filed. It is not an unreasonable construction of the bankrupt act which regards it as vesting in the assignee, for the benefit of creditors in general, the estate of the bankrupt discharged of liens or trusts, which, at the time of the filing of the petition, are valid only *inter partes* under the statute of the state in which they are claimed to exist: *In re Wynne*, 4 B. R. 23; *Brock* v. *Terrell*, 2 Id. 643; *Allen* v. *Massey et al.*, 4 Id. 248; *National Bank* v. *Hunt*, 11 Wall. 391; *Harvey* v. *Crane*, 5 B. R. 218; *Edmondson* v. *Hyde*, 7 Id.; *In re Perrin et al.*, 7 Id. 283.

30. "Mesne process" is all process issued in a suit before execution: *Pennington* v. *Lowenstein*, 1 B. R. 570.

31. An attachment made March 8, 1867, at seven o'clock in the afternoon, was dissolved by the commencement of proceedings in bankruptcy on July 8, 1867, at two o'clock and fifteen minutes in the afternoon, for it was made within the period of four months prior to such commencement. Fractions of a day will be considered and the very hour ascertained where the means for an accurate computation are afforded: *Westbrook Manuf. Co.* v. *Grant*, 60 Me. 88.

32. An attachment properly issued is legal and valid until dissolved. It is not vacated or made void *ab initio* by the commencement of proceedings in bankruptcy, but simply dissolved. All proceedings under it up to that time are regular and valid: *In re Housberger et al.*, 2 B. R. 92; *In re C. H. Preston*, 6 Id. 545.

33. Where the attachment was issued within four months before the commencement of the proceedings in bankruptcy, it will, on motion, be dissolved by the state court, although a judgment has been entered and the proceeds of a sale of the property, under an execution, paid over to the plaintiff by the sheriff: *Dickerson* v. *Spaulding*, 15 B. R. 313.

34. No intervention by the assignee in the attachment suit is essential to the dissolution of a garnishment. When the bankruptcy of the garnishee occurs, the fund falls back into the estate, and is unaffected by a judgment between a bankrupt and a third person assuming to direct it: *Janes* v. *Beach*, 1 Mich. N. P. 94.

35. From the date of the dissolution of the attachment, the sheriff, or other person having then actual possession of the attached property, becomes divested of all official relations to that property, and becomes a simple bailee thereof to the use of the person by virtue of the bankrupt act entitled to the same. If he afterwards, by sale or in any other way, disposes of the property otherwise than to transfer the bankrupt's interest in the same to him to whom by the bankrupt law it falls, his act has no official character, and needs, to make it valid, the ratification of the person having title under the law: *In re C. H. Preston*, 6 B. R. 545.

36. The attaching creditor can not prove the costs incurred in the attachment, because, until judgment is obtained, they are not a debt of the bankrupt, for they were not incurred for his benefit or at his request; *In re Fortune*, 2 B. R. 662; *Gardner* v. *Cook*, 7 Id. 346; *In re C. H. Preston*, 6 Id. 545.

37. No attachment made prior to the period of four months next preceding the commencement of proceedings in bankruptcy is dissolved. Not being dissolved, it remains in full force. When the attachment is so made prior to that time, the debtor's title to the property attached passes to the assignee, subject to the creditor's lien acquired by virtue of such attachment. The lien may be enforced by any requisite proceedings therefor which do not involve a judgment *in personam*. A judgment only to be enforced against the property attached, but not to be enforced against the person of the defendant or any other property, may be entered, even though a discharge has been granted and is pleaded in bar of the action: *Bates* v. *Tappan*, 3 B. R. 647; *Bowman* v. *Harding*, 4 Id. 20; *Samson* v. *Burton et al.*, Id. 1; *Leighton* v. *Kelsey et al.*, Id. 471; *Perry* v. *Somerly*, 57 Me. 552; *Stoddard* v. *Locke*, 9 B. R. 71; *Daggett* v. *Cook*, 37 Conn. 341; *May* v. *Courtnay*, 47 Ala. 185.

38. A creditor, having a valid attachment, can at any time be prohibited from selling the property attached. The assignee has the right to free the estate from the attachment lien, if that course becomes advisable, and the

SEC. 18. The assignee shall have the right to recover all the estate,[a] debts, and effects of said insolvent. If, at the time of the commencement of proceedings in insolvency, an action is pending in the name of the debtor, for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall be allowed and admitted to prosecute the action,[b] in like manner and with like effect as if it had been originally commenced by him. In suits prosecuted by the assignee, a certified copy of the assignment made to him shall be conclusive evidence of his authority to sue.*

(*a*) The word "estate" signifies everything of which riches or fortune may consist, and includes personal and real property; hence we say personal estate, real estate: 16 Johns. N. Y. 587; 3 Cranch, 97.

(*b*) C. C. P., sec. 385.

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district court can protect him in the exercise of that right, and interpose its authority at such time as may be most expedient or proper: *Samson* v. *Burton et al.*, 4 B. R. 1; *Samson* v. *Clark*, 6 Id. 403.

39. The return of the sheriff showing a valid attachment, is conclusive, and can not be impeached by proofs *ab extra*: *Bowman* v. *Harding*, 4 B. R. 20.

40. The provisions of this clause do not apply to the collateral liability of sureties upon a bond given to dissolve the attachment, and by which the lien is discharged. The bond is not a mere substitute for the attachment. It does not merely restore the possession of the property to the debtor, subject to the attachment; it dissolves the attachment utterly. It is not given for the property itself, nor as security for its value, but for the payment absolutely of the judgment when recovered in the suit, whatever may be its amount. It is not the equivalent of the attachment, and has not its incidents. The discharge, when obtained, may be pleaded in bar to the action, and the sureties on the bond may thus be released, even though the attachment was issued more than four months prior to the commencement of proceedings in bankruptcy: *Carpenter et al.* v. *Turrell*, 100 Mass. 450; *Williams* v. *Atkinson*, 36 Tex. 16; *vide Zollar* v. *Janvrin*, 49 N. H. 114; *Holyoke* v. *Adams*, 2 N. Y. Supr. 1.

41. If the plaintiff in an attachment suit, issued within four months before the commencement of the proceedings in bankruptcy, obtains a judgment and issues an execution after that time under which the attached property is sold, he is liable to the assignee for the value: *Brackon* v. *Johnson*, 15 B. R. 106.

* U. S. R. S., Sec. 5047.—The assignee shall have the like remedy to recover all the estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. If at the time of the commencement of the proceedings in bankruptcy an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him. And if any suit at law or in equity, in which the bankrupt is a party in his own name, is pending at the time of the adju-

SEC. 19. The assignee shall, within one month after the making of the assignment to him, cause the same to be recorded in every county, or city and county, within this State, where any lands owned by the debtor are situated, and the record of such assignment, or a duly certified copy thereof, shall be conclusive evidence thereof in all Courts.*

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dication of bankruptcy, the assignee may defend the same in the same manner and with the like effect as it might have been defended by the bankrupt.

U. S. R. S., Sec. 5048.—No suit pending in the name of the assignee shall be abated by his death or removal; but upon the motion of the surviving or remaining or new assignee, as the case may be, he shall be admitted to prosecute the suit in like manner and with like effect as if it had been originally commenced by him.

U. S. R. S., Sec. 5049.—A copy duly certified by the clerk of the court, under the seal thereof, of the assignment, shall be conclusive evidence of the title of the assignee to take, hold, sue for, and recover the property of the bankrupt.

1. It is not necessary to allege in detail the adjudication, the appointment of assignee, and the assignment and record thereof. As in the case of an executor or administrator, it is only necessary to state ——— assignee of the estate of ———, duly adjudged a bankrupt according to the statute in such case made and provided: *Wheelock* v. *Lee*, 10 B. R. 363.

2. The words "he may prosecute" are permissive. It only becomes a duty for an assignee to prosecute a suit when the interest of the estate demands it, of which the assignee is in the first instance the judge: *Reade* v. *Waterhouse*, 10 B. R. 277.

* U. S. R. S., Sec. 5054.—The assignee shall immediately give notice of his appointment by publication at least once a week for three successive weeks in such newspapers as shall for that purpose be designated by the court, due regard being had to their general circulation in the district or in that portion of the district in which the bankrupt and his creditors shall reside, and shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States, where a conveyance of any lands owned by the bankrupt ought by law to be recorded.

1. The purpose in requiring the assignee to cause the assignment to be recorded is that every purchaser of land at an assignee's sale may have recourse to a certified copy of such registry, as a link in his claim of title in any suit he may bring for the possession, or in any suit in respect to the property which he, or his heirs, or others claiming under him, may desire to bring thereafter. Registration is necessary to the safety of such purchaser; for there is but one original assignment, and that is filed in the office of the clerk of the district court. When this law is observed, the loss of the original would work no loss or inconvenience to the purchaser or others claiming under him; for they could have recourse to a certified copy from the registry, which the act declares shall be evidence thereof in all courts. The object in requiring the assignment to be recorded is not to vest a title in the assignee, for he has title though the assignment may never be recorded. The assignee may use it as evidence of his title in the courts, though the same may not have been recorded: *In re Neale*, 3 B. R. 177.

2. As the county records should contain a complete registry of all instruments on which transfers of title depend, it was eminently proper for the protection of all concerned, that the assignment in bankruptcy should be there recorded; an instrument in writing, which though not conforming in the usual particulars with conveyances from one party to another, or even with sheriff's deeds, yet by the paramount law is a complete transfer and

SEC. 20. Any assignee may at any time, by writing filed in Court, resign his appointment, having first settled his accounts, and delivered up all the estate to such successor as the Court shall appoint; *provided*, that if, in the discretion of the Court, the circumstances of the case require it, upon good cause being shown, the Court may, at any time before such settlement of account and delivery of the estate shall have been completed, revoke the appointment of such assignee, and appoint another in his stead. The liability of the outgoing assignee, or of the sureties on his bond, shall not be in any manner discharged, released, or affected by such appointment of another in his stead.*

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conveyance of all the bankrupt's real and equitable interests, with the exceptions named in the act. That instrument is not signed by the bankrupt, or acknowledged by him, but is signed by the register or judge. When the assignment is recorded, the record, or a duly certified copy thereof, is made evidence of the assignment in all courts, notwithstanding very different rules as to instruments affecting realty may obtain under State laws. It is to be remarked, that the clause directing the assignment to be recorded, gives no further effect thereto than that just stated. The assignment itself passes the property with relation back to the commencement of the proceedings, and all subsequent purchasers are affected accordingly, whether they purchased before assignment actually made or afterwards, and consequently the recording of the assignment is not essential to the validity of the transfer, and is not designed to operate as under State registry acts. A purchaser from the bankrupt, after the commencement of proceedings, although he has no notice thereof, will take no title. The question of notice can not arise. The purchase being of what the bankrupt debtor had at the time, and all his interest having passed to the assignee previously, the purchaser acquires no title as against the assignee: *Davis* v. *Anderson*, 6 B. R. 145.

3. When the assignment has been recorded, and it is apparent of record at the time of a sale on execution, that the judgment debtor has no title to or interest in the property sold, the purchaser at the sheriff's sale acquires no title: *Stuart* v. *Hines*, 6 B. R. 416.

4. The purchaser at a sale of real estate by the assignee of a bankrupt, will hold the title against a prior unrecorded deed of the bankrupt: *Holbrook* v. *Dickinson*, 56 Ill. 489.

* U. S. R. S., Sec. 5038.—An assignee may, with the consent of the judge, resign his trust, and be discharged therefrom.

U. S. R. S., Sec. 5039.—The court, after due notice and hearing, may remove an assignee for any cause which, in its judgment, renders such removal necessary or expedient. At a meeting called for the purpose by order of the court, in its discretion, or called upon the application of a majority of the creditors in number and value, the creditors may, with consent of the court, remove any assignee by such a vote as is provided for the choice of assignee.

U. S. R. S., Sec. 5040.—The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust, and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee.

1. The removal of an assignee is a matter in the discretion of the court. Such discretion is, however, a legal discretion, and can only be exercised to

SEC. 21. The said assignee shall have power:

1. To sue in his own name and recover all the estate, debts, and things in action, belonging or due to such debtor, and no set-off or counter-claim[a] shall be allowed in any such suit, for any debt, unless it was owing to such creditor by such debtor at the time of the adjudication of insolvency;

2. To take into his possession all the estate of such debtor except property exempt by law from execution, whether

(*a*) A counter-claim in cases prosecuted in superior courts is:

1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising upon contract; any other cause of action arising also upon contract and existing at the commencement of the action: C. C. P., sec. 438.

In justices' courts a counter-claim is any cause of action upon which an action might be brought by the defendant against the plaintiff in a justice's court: C. C. P., sec. 855.

A counter-claim is a cause of action in favor of defendant upon which he might have sued the plaintiff and obtained affirmative relief in a separate action: *Bellan* v. *Thompson et al.*, 33 Cal. 495.

Plaintiff's action arose out of a contract; and defendant was allowed to introduce evidence of a counter-claim existing at the commencement of the action, even where the contracts were not the same: *Held*, to be proper: *Stoddard* v. *Treadwell*, 26 Id. 294.

The debts must be between the parties in their own rights,

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remove an assignee when cause is shown rendering such removal expedient or necessary: *In re Blodgett & Sandford*, 5 B. R. 472; *In re Mallory*, 4 Id. 153.

2. Upon a petition to remove the assignee for misconduct in instituting a suit, the question is not whether the suit was without a proper legal foundation, but whether its prosecution was fraudulent, malicious, or from unjust motive, and not in good faith, for the benefit of the general creditors: *In re Sacchi*, 6 B. R. 398.

3. If one creditor becomes the sole creditor by the purchase of all the other claims, a new assignee may, upon the application of the bankrupt and such sole creditor, be substituted for the one originally elected by the creditor: *In re Sacchi*, 6 B. R. 398.

4. An assignee is not appointed simply for his own profit, but as trustee for the creditors, and he is bound to exercise due diligence in collecting and disposing of the property of the bankrupt, and in distributing its proceeds among the creditors. If he is guilty of gross and culpable neglect of duty in this respect, he may be removed: *In re Morse*, 7 B. R. 56.

5. When creditors apply to an assignee to ascertain the condition of the estate, it is his duty to communicate all material facts within his knowledge, and the willful suppression of such facts is a ground for removal: *In re Perkins*, 8 B. R. 56.

attached or delivered to him or afterwards discovered, and all books, vouchers, evidence of indebtedness, and securities belonging to the same;

3. In case of a non-resident absconding or concealed debtor, to demand and receive of every Sheriff who shall have attached any of the property of such debtor, or who shall have in his possession any moneys arising from the sale of such property, all such property and moneys on paying him his lawful costs and charges for attaching and keeping the same;

4. From time to time to sell at public auction all the estate, real and personal, vested in him as such assignee,

of the same kind and liquidates: *Naglee* v. *Palmer*, 7 Id. 543.

A court of equity will look to the real parties in interest, and adjudicate accordingly: *Hobbs* v. *Duff*, 23 Id. 596.

Where judgments in different courts are to be set off, the moving party must go into the court in which the judgment against himself was recovered: *Russell* v. *Conway*, 11 Id. 101.

The demand to be set off need not be in the form of a personal judgment: *Hobbs* v. *Duff*, 23 Id. 596.

In an action at law to recover damages for failure to comply with a covenant to indemnify plaintiff against liabilities, the defendant can not set up as a counter-claim, demands which were matters of partnership between the parties: *Haskill* v. *Moore*, 29 Id. 437.

A debtor has a right to purchase cross-demands against a partnership, and to set them up as a defense to a debt due by him to a partnership: *Naglee* v. *Minturn*, 8 Id. 540; *Marye* v. *Jones*, 9 Id. 335.

A court of equity will not permit a *cestui que trust* who is insolvent, to enforce and collect through his trustee, a judgment against a party who holds a just and valid demand against the *cestui que trust* who has no means of enforcing or collecting if a set-off be denied: *Hobbs* v. *Duff*, 9 Id. 596.

A joint debt due from plaintiff and another may be set off in equity if the debtors are insolvent, or if defendants are in danger of losing their demand: *Howard* v. *Shores*, 20 Id. 277.

Where the defendant in one of the judgments was insolvent, and the plaintiff in the other was not the real party in interest, but a trustee for the insolvent defendants in

which shall come to his possession and as ordered by the Court;[b]

5. On such sales to execute the necessary conveyances and bills of sale;

6. To redeem all valid mortgages and conditional contracts, and all valid pledges of personal property, and to satisfy any judgments which may be an incumbrance on any property sold by him, or to sell such property subject to such mortgage, contracts, pledges, or judgments;

7. To settle all matters and accounts between such debtor and his debtors subject to the approval of the Court;

8. Under the order of the Court appointing him, to compound with any person indebted to such debtor, and thereupon to discharge all demands against such person;[c]

9. To have and recover from any person receiving a conveyance, gift, transfer, payment, or assignment, made contrary to any provision of this Act, the property thereby transferred or assigned, or in case a redelivery of the prop-

the other judgment, a court of equity decreed a set-off: *Hobbs* v. *Duff*, 20 Id. 596.

In the same action two judgments were entered, one for plaintiff, and one for defendant for a less sum: *Held*, that the defendant had a right to set off his judgment *pro tanto* against that of the plaintiff, and that this right could not be defeated by any assignment by plaintiff of his judgment before application of the set-off: *Porter & Allen* v. *Liscom*, 22 Id. 430.

In a civil action for assault and battery, a libel published by the plaintiff concerning the defendant can not be set up as a counter-claim: *McDougal* v. *Maguire*, 35 Id. 274.

A joint claim by two persons can not be pleaded as a counter-claim by one defendant, except when the whole interest therein has been transferred to him: *Stearns* v. *Martin*, 4 Id. 229.

A set-off can not be pleaded by one of several defendants sued on joint liability: *Collins* v. *Butler*, 14 Id. 223; *Howard* v. *Shores*, 20 Id. 277.

A matter which does not arise out of the transaction set forth in the complaint, and which is not connected with the subject of the action, does not constitute a counter-claim: *James* v. *Center*, 53 Id. 31.

(*b*) *Vide* notes to sec. 25.

(*c*) Secs. 1521, 1522, 1523, 1524, C. C.

erty can not be had, to recover the value thereof, with damages for the detention.*

SEC. 22. The insolvent shall, either before or on the day appointed for the meeting of creditors, deliver to the Court all the commercial or account books he may have kept, which books shall be deposited in the Clerk's office of said Court. Said insolvent shall also deliver to the Court, at the same time, all vouchers, notes, bonds, bills, securities, or other evidences of debt, in any manner relating to or having any bearing upon or connection with the property surrendered by said debtor, and all such papers or securities shall be deposited in the Clerk's office of said Court, and the Clerk shall hand them over, together with the books of the insolvent, to the assignee who may be appointed.[a]

SEC. 23. If any person,[a] before the assignment is made, having notice of the commencement of proceedings in insolvency, embezzles or disposes of any of the moneys, goods, chattels, or effects of the insolvent, he is chargeable therewith, and liable to an action by the assignee for double the value of the property so embezzled or disposed of, to be recovered for the benefit of the estate.[b]

(*a*) *Vide* sec 6.

(*a*) Sec. 1458, C. C. P. If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels, or effects of a decedent, he is chargeable therewith and liable to an action by the executor or administrator of the estate, for double the value of the property so embezzled and alienated, to be recovered for the benefit of the estate.

(*b*) Probably if the defendant came into possession inno-

* U. S. R. S., Sec. 5055.—The assignee shall demand and receive from all persons holding the same, all the estate assigned or intended to be assigned.

U. S. R. S., Sec. 5062. — The assignee shall sell all such unincumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors; but upon petition of any person interested, and for the cause shown, the court may make such order concerning the time, place, and manner of sale as will, in its opinion, prove to the interest of the creditors.

U. S. R. S., Sec. 5066. — The assignee shall have authority, under the order and direction of the court, to redeem and discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other incumbrance.

SEC. 24. The same penalties, forfeitures, and proceedings by citation, examination, and commitment, shall apply on behalf of an assignee against persons suspected of having concealed, embezzled, conveyed away, or disposed of any property of the debtor, or of having possession or knowledge of any deeds, conveyances, bonds, contracts, or other writings which relate to any interest of the debtor in any real or personal estate, as provided in the case of the estates of deceased persons in sections one thousand four hundred and fifty-nine,[a] one thousand four hundred and

cently, and for a lawful purpose, and under a *bona fide* claim or color of right, or in ignorance of the title, the statute, which is penal in its character, would not be so construed as, by mere force of a demand and refusal, or inability of compliance, to bring the defendant within the penalty: *Beckman* v. *McKay*, 14 Cal. 253.

Such action may be maintained against one who has embezzled or aliened the personal estate of the deceased without the aid of section 1458 of the Code of Civil Procedure; and the said section does not give a new right of action, but merely increases the damages: *Jahns* v. *Nolting*, 29 Id. 507. It is not a penal, but a remedial statute: Id.

(*a*) Sec. 1459, C. C. P. If any executor, administrator, or other person interested in the estate of a decedent, complains to the Superior Court, or a judge thereof, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away, or dispossd of any moneys, goods, or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings, which contain evidences of or tend to disclose the right, title, interest, or claim of the decedent to any real or personal estate, or any claim or demand, or any last will, the said court or judge may cite such person to appear before such court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where the decedent dies, or where letters have been granted, he may be cited and examined, either before the superior court of the county where he is found, or before the superior court of the county where the decedent dies, or where letters have been granted. But if, in the latter case, he appears and is found innocent, his necessary expenses must be allowed him out of the estate.

sixty,[b] and one thousand four hundred and sixty-one[c] of the Code of Civil Procedure.

(*b*) Sec. 1460, C. C. P. If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him, touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court, or is discharged according to law. If, upon such examination, it appears that he has concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings containing evidences of or tending to disclose the right, title, interest, or claim of the decedent, to any real or personal estate, claim, or demand, or any last will of the decedent, the court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with, or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the court. The order for such disclosure made upon such examination, shall be *prima facie* evidence of the right of the executor or administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for return of the property, and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side.

(*c*) Sec. 1461, C. C. P. The superior court, or a judge thereof, upon the complaint, on oath, of any executor or administrator, may cite any person who has been intrusted with any part of the estate of the decedent to appear before such court, and require him to render a full account, on oath, of any moneys, goods, chattels, bonds, accounts, or other property, or papers belonging to the estate, which have come to his possession in trust for the executor or administrator, and of his proceedings thereon; and if the person so cited refuses to appear and render such account, the court may proceed against him as provided in the preceding section.

SEC. 25. The assignee shall, as speedily as possible, convert the estate, real and personal, into money. He shall keep a regular account of all moneys received by him as assignee, to which every creditor or other person interested therein may, at all reasonable times, have access. No private sale of any property of the estate of an insolvent debtor shall be valid,[a] unless made under the order of the Court[b] upon a petition in writing, which shall set forth the facts showing the sale to be necessary.[c] Upon filing the petition, notice of at least ten days shall be given by publication and mailing, in the same manner as is provided in section seven of this Act.[d] If it appears that a private sale is for the best interests of the estate, the court shall order it to be made.*

SEC. 26. When it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or is liable to deteriorate in value, or is disproportionately expensive to keep, the Court may order the same to be sold in such manner as may be deemed most expedient, under the direction of the sheriff or assignee, as

(*a*) This has no reference to judicial sales under decrees of Superior Courts: *Fallon* v. *Butler*, 21 Cal. 25.

(*b*) Sec. 1517, C. C. P. No sale of any property of an estate of a decedent is valid unless made under order of the Superior Court. * * * Sec. 1518, Id. All petitions for orders of sale must be in writing, setting forth the facts showing the sale to be necessary. * * *

(*c*) The truth of the averments—their sufficiency appearing—must be determined at the hearing of the petition. If the order of sale was rendered upon legal notice, it can not be questioned collaterally: *Haynes* v. *Meekes*, 20 Cal. 288; *Fitch* v. *Miller*, Id. 352.

The property must be described in the petition, or the sale is void: *Townsend* v. *Gordon*, 19 Id. 188.

(*d*) A sale by executors of the personal estate of their testator, upon insufficient notice thereof, is voidable, at least, if not void: *Halleck* v. *Moses*, 17 Id. 339. A strict compliance with the law is necessary to jurisdiction: *Townsend* v. *Tallant*, 33 Id. 54.

* U. S. R. S., Sec. 5064.—The assignee may sell and assign, under the direction of the court, and in such manner as the court shall order, any outstanding claims or other property in his hands, due or belonging to the estate, which can not be collected and received by him without unreasonable or inconvenient delay or expense.

the case may be, who shall hold the funds received in place of the property sold, until the further order of the Court.[a] *

SEC. 27. Outstanding debts, or other property due or belonging to the estate, which can not be collected and received by the assignee without unreasonable or inconvenient delay or expense, may be sold and assigned in like manner as the remainder of the estate.

SEC. 28. Assignees[a] shall be allowed all necessary expenses in the care, management, and settlement of the estate, and shall collectively be entitled to charge and receive for their services commissions upon all sums of money coming to their hands and accounted for by them, as follows: For the first thousand dollars, at the rate of seven per cent.; for all above that sum and not exceeding ten thousand dollars, at the rate of five per cent.; and for all above that sum, at the rate of four per cent.[b, c, d] †

(*a*) *Vide* sec. 1522, C. C. P.

(*a*) C. C. P., Secs. 1616, 1618. The executor or administrator shall be allowed all necessary expenses in the care, management, and settlement of the estate. * * * They shall be allowed for the first thousand dollars, at the rate of seven per cent.; for all above that sum, and not exceeding ten thousand dollars, at the rate of five per cent.; for all above that sum, at the rate of four per cent. * * *

(*b*) An administrator, being compelled by law to hold, protect, and guard funds coming into his hands, which he has reason to believe to be assets of the estate, until the right to the funds can be determined, is entitled to his commissions thereon: *Wells, Fargo & Co.* v. *Robinson*, 13 Cal. 134; *Estate of Isaacs*, 30 Id. 105. The value of the estate which has been taken into possession, and having been in possession, has been accounted for, is alone to be regarded: *Estate of Beezer Simmons*, 43 Id. 543.

(*c*) The administrator, after he has become such, has the

* U. S. R. S., Sec. 5065.—When it appears to the satisfaction of the Court that the estate of the debtor, or any part thereof, is of a perishable nature, or liable to deteriorate in value, the Court may order the same to be sold, in such manner as may be deemed most expedient, under the direction of the messenger or assignee, as the case may be, who shall hold the funds received in place of the estate disposed of.

† U. S. R. S., Sec. 5099.—The assignee shall be allowed, and may retain out of money in his hands, all the necessary disbursements made by him in

SEC. 29. At the expiration of three months from the appointment of the assignee in any case, or as much earlier as the court may direct, the assignee shall exhibit to the court and to the creditors, and file just and true accounts of all his receipts and payments, verified by his oath, and a statement of the property outstanding, specifying the cause of its outstanding, also what debts or claims are yet undetermined, and stating what sum remains in his possession; and thereupon a dividend shall be made, unless for cause the Court shall otherwise order. Thereafter further accounts, statements, and dividends shall be made in like manner as often as occasion requires.*

right, and it is his duty, to employ competent counsel to aid him in the management of adversary suits in which the estate may be involved while under his care, and fees for such services may be allowed from the assets of the estate: 43 Id. 543.

(*d*) Co-executors are entitled to be each credited with all disbursements legally made on behalf of the estate; and the court should fix the compensation of each in proportion to the service rendered. Each may keep a separate account: *Hope* v. *Jones*, 24 Cal. 91.

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the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court.

U. S. R. S., Sec. 5100.—In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum thereon; for any larger sum, not exceeding five thousand dollars, two and a half per centum on the excess over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars. If, at any time, there is not in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him.

* U. S. R. S., Sec. 5092.—At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given, and the assignee shall then report, and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath, and he shall also produce and file vouchers for all payments for which vouchers are required by any rule of the court; he shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, and showing what debts or claims are yet undeter-

SEC. 30. The court shall, at any time, upon the motion of any two or more creditors, require the assignee to file his account, and if he has funds subject to distribution, he shall be required to distribute them without delay.

SEC. 31. All creditors whose debts are duly proved and allowed, shall be entitled to share in the property and estate *pro rata*, without priority or preference whatever, other than as provided in this act, and in section one thousand two hundred and four of the Code of Civil Procedure;[a] *provided*, that any debt proved by any person liable as bail surety, guarantor or otherwise, for the debtor, shall not be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable; and the share to which such debt would be entitled may be paid into court,[b] or otherwise held for the benefit of the party entitled thereto, as the court may direct.

SEC. 32. No dividend already declared shall be distributed [disturbed?] by reason of debts being subsequently proved, but the creditors proving such debts shall be enti-

(*a*) Sec. 1204, C. C. P. In all assignments of property, made by any person to trustees or assignees, on account of the inability of the person, at the time of the assignment, to pay his debts, or in proceedings in insolvency, the wages of the miners, mechanics, salesmen, servants, clerks, or laborers employed by such person, to the amount of one hundred dollars each, and for services rendered within sixty days previously, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of the assignor.

(*b*) Secs. 572, 573, 574, C. C. P.

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mined, and what sum remains in his hands. The majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one half in value of the creditors attend the meeting, either in person or by attorney, it shall be the duty of the assignee so to determine.

U. S. R. S., Sec. 5093.—Like proceedings shall be had at the expiration of the next three months, or earlier, if practicable, and a third meeting of creditors shall then be called by the court, and a final dividend then declared, unless any suit at law or in equity is pending, or unless some other estate or effects of the debtor afterward come to the hands of the assignee, in which

tled to a dividend equal to those already received by the other creditors, before any further dividend is made to the latter; *provided*, the failure to prove such claim shall not have resulted from his own neglect.*

SEC. 33. Should the assignee refuse or neglect to render his accounts, as required by sections thirty and thirty-one, or pay over a dividend when he shall have, in the opinion of the court, sufficient funds for that purpose, the court shall immédiately discharge such assignee from his trust, and shall have power to appoint another in his place. The assignee so discharged shall forthwith deliver over to the assignee appointed by the court all the funds, property, books, vouchers, or securities belonging to the insolvent, without charging or retaining any commission or compensation for his personal services.

SEC. 34. Preparatory to the final account and dividend the assignee shall submit his account to the court, and file the same, and shall at the time of filing accompany the same with an affidavit that notice by mail has been given to all creditors who have proved their claims; that he will apply for a settlement of his account, and for a discharge from all liability as assignee at a time specified in such notice, which time shall be not less than ten or more than twenty days from such filing. At the hearing, the court shall audit the account, and any person interested may appear and file exceptions in writing, and contest the same. The court thereupon shall settle the account, and order a dividend of any portion of the estate remaining undistributed, and shall discharge the assignee, subject to compliance with the order of the court, from all liability, as assignee, to any creditor of the insolvent.†

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case the assignee shall, as soon as may be, convert such estate and effects into money, and within two months after the same are so converted they shall be divided in manner aforesaid. Further dividends shall be made in like manner as often as occasion requires, and after the third meeting of creditors no further meeting shall be called, unless ordered by the court.

1. The bill of the assignee's attorney should be presented by the assignee as part of his account: *In re Hobbell & Chappell*, 9 B. R. 523.

* U. S. R. S., Sec. 5097.—No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors, before any further payment is made to the latter.

† U. S. R. S., Sec. 5094.—The assignee shall give such notice to all known

creditors, by mail or otherwise, of all meetings, after the first, as may be ordered by the court.

U. S. R. S., Sec. 5096.—Preparatory to the final dividend, the assignee shall submit his account to the court, and file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the accounts of the assignee, and the assignee shall, if required by the court, be examined as to the truth of his account, and if it is found correct, he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt. The court shall thereupon order a dividend of the estate and effects, or of such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their debts.

ARTICLE V.

PARTNERSHIPS AND CORPORATIONS.

SECTION

35. Partners may be adjudged insolvent; Petition for; Five or more creditors to sign petition; Order to show cause to issue; Partnership property and each partner's separate estate to be taken; Exempt property not taken; All creditors may prove debts; Partnership creditors to choose assignee; Assignee to keep separate accounts of joint and separate estate; Proceeds, how applied; Certificate of discharge; Parts of Act applicable; Petition for adjudication, where filed; Partners not joining in petition to show cause.

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SEC. 35. Two or more persons who are partners in business may be adjudged insolvent, either on the petition

of such partners or any one of them, or on the petition of five or more creditors of the partnership, in which case an order shall be issued in the manner provided by this act, upon which all the joint stock and property of the partnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as may be exempt by law, and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignee shall be chosen by the creditors of the copartnership, and shall also keep separate accounts of the joint stock or property of the copartnership, and of the separate estate of each member thereof, and, after deducting out of the whole amount received by such assignee, the whole amount of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock, after the payment of the joint debts, such balance shall be divided and appropriated to and among the separate estate of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any insolvency; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts, and the certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been by or against him alone under this act; and in all other respects the proceedings as to partners shall be conducted in the like manner as if they had been commenced and prosecuted by or against one person alone. If such copartners reside in different counties, that court in which the petition is first filed shall retain exclusive jurisdiction over the case. If the petition be filed by less than all the partners of a copartnership, those partners who do not join in the petition shall be ordered to show cause why they should not be adjudged to be insolv-

ent in the same manner as other debtors are required to show cause upon a creditor's petition, as in this act provided.*

* U. S. R. S., Sec. 5121.—Where two or more persons who are partners in trade are adjudged bankrupt, either on the petition of such partners or of any one of them, or on the petition of any creditor of the partners, a warrant shall issue, in the manner provided by this title, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted. All the creditors of the company, and the separate creditors of each partner, may prove their respective debts. The assignee shall be chosen by the creditors of the company. He shall keep separate accounts of the joint stock or property of the copartnership and of the separate estate of each member thereof; and after deducting out of the whole amount received by the assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. If there is any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there is any balance of the joint stock after payment of the joint debts, such balance shall be appropriated to and divided among the separate estates of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts. The certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone. In all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone. If such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

1. Partners may join or be joined in one petition so long as joint assets remain to be distributed; also, if there are joint debts outstanding: *In re Williams & Co.*, 3 B. R. 286; *In re Noonan*, 10 Id. 331.

2. Notwithstanding one partner has, on dissolution, taken all the partnership property, and agreed to pay all partnership debts, either may petition for the benefit of the act on behalf of the firm. The creditors may proceed against the partners, unless one partner has been released by them: *In re Stowers*, Lowell, 528.

3. An assignment of all the interest of the retiring partner in the firm terminates the partnership: *Hartough* v. *Hoyden*, 3 B. R. 422.

4. Persons comprising one firm may petition without joining another, who has been a partner with them under another firm name: *In re Mitchell*, 3 B. R. 441; *In re Stevens*, 5 Id. 112.

5. The executor of a deceased partner can not be brought into bankruptcy, nor can possession be taken of his separate estate, which is under control of a probate court. If the surviving partner, while clothed with his rights as such, commits an act of bankruptcy, the creditors may invoke the aid of a court of bankruptcy to take out of his hands the joint assets, as well as his separate estate. Such proceeding can be taken by either a joint or separate creditor: *In re Stevens*, 5 B. R. 112.

6. A firm can not be adjudged bankrupt upon petition of one partner, if the others do not consent, and neither reside nor carry on business in the district: *In re Martin*, 6 Ben. 20.

7. Unless all the members of a firm join in the petition, those not joining must be notified in like manner as if the proceedings were on an involuntary petition: *In re Lewis*, 1 B. R. 329; *In re Moore*, 5 Biss. 79.

8. When the partners reside in different districts, and have no place of business in the district where the petition is filed, the non-resident partner can not be adjudged a bankrupt upon his own petition, unless he shall have filed a petition in the district where he resides: *In re Prankhard*, 1 B. R. 297.

9. When one member of a firm asks for the benefit of the bankrupt act, the question of bankruptcy becomes a legal one, and if the others object they are entitled to have the issue of bankruptcy tried and determined: *In re Grady*, 3 B. R. 227.

10. Where there are no assets, a member of a late partnership may, upon his individual petition, be discharged from all individual and partnership debts: *In re Abbe*, 2 B. R. 75.

11. Distinct firms, composed in part of different persons, can not be joined: *In re Wallace & Huton*, 12 B. R. 191.

12. Partners can not be adjudged bankrupts upon petition of their creditors, upon mere proof of their insolvency, without proof of the commission of an act of bankruptcy: *In re Johnson*, 1 N. Y. Leg. Obs. 166; *In re John W. Hall*, Id. 11.

13. None but the creditors of a firm can participate in the election of an assignee: *In re Phelps*, 1 B. R. 525; *In re Scheiffer*, 2 Id. 591.

14. The separate debts must be regarded as confined to debts which arise out of a liability other than, or in addition to, that resulting solely from a debt contracted by the firm: *In re Long & Co.*, 9 B. R. 227.

15. A joint creditor having a security upon the separate estate is entitled to prove against the joint estate, without giving up his security. A creditor having a note indorsed by the firm and by one of the copartners, may prove his claim against both of the estates: *In re Howard, Cole & Co.*, 4 B. R. 571; *In re Bradley*, 2 Biss. 515.

16. Money loaned upon the note of a partner for the use of the firm can not be proved against the firm: *In re Herrick*, 13 B. R. 312.

17. The assignee of a bankrupt partner and the remaining solvent partner are tenants in common in respect to the partnership funds, and like all tenants in common, one party can not call the joint property out of the hands of the other: *Murry* v. *Murry*, 5 Johns. Ch. 60. Each may collect debts due the firm: Id. The assignee succeeds to the rights of the bankrupt, not as a partner, but as tenant in common: *Ayer* v. *Brastow*, 5 Law Rep. 498.

18. There must be an adjudication of bankruptcy against all the partners before any steps can be taken to reach partnership assets. An assignee of the individual estate of one partner has no title to call third parties to an account for partnership property: *In re Shepard*, 3 B. R. 172; *Amsink* v. *Bean*, 22 Wall. 395.

19. This section, in its main features, embodies no new law. It is only declaratory of the equitable principles which the courts had adopted in the distribution of the bankrupt's assets: *In re Melick*, 4 B. R. 97.

20. If a transfer of the firm property to one of the copartners is made honestly, and in good faith, upon a dissolution, and for a valuable consideration, and without any fraud or collusion between the copartners to defeat the rights of the joint creditors, the joint property becomes by such transfer the separate property of such copartner: *In re Long & Co.*, 9 B. R. 227.

21. Where only five days had intervened between the dissolution of the firm and the commencement of proceedings in bankruptcy, the transfer of the partnership property was held to be void, as a fraud on the partnership creditors, and the property so transferred was held to be a joint fund: *In re Byrne*, 1 B. R. 464.

22. When firm property has been transferred to a partner under an agreement to apply the proceeds of the same to the payment of the firm debts, and he has purchased other property, and mingled it with the firm property in such a manner as to make it impossible to distinguish between them, the whole should be regarded as his individual property, and liable in the first instance to his individual debts: *In re H. B. Montgomery*, 3 B. R. 374.

23. When the bankrupt has been a member of two separate firms, the property of each firm must be applied to the payment of its own debts in

preference to the debts of the other firm. No part of the proceeds of such property can be applied to the latter debts until the former are fully paid: *In re Hinds et al.*, 3 B. R. 351.

24. If the partners conduct business in two different places under different names, the two firms, in the distribution of the assets, will be treated as one firm, and no notice will be taken of the indebtedness of one firm to the other: *In re Theo. H. Vetterlein et al.*, 5 Bt. 311.

25. If one of the bankrupts is a member of a firm which is a creditor, the whole dividend should not be paid to the firm, but the proportion to which the bankrupt would be entitled should be retained for his individual creditors, and the rest paid to the other members of the firm: *In re Joel A. H. Ellis*, 5 Bt. 421.

26. The firm creditors can not have recourse to the separate estate for money advanced by the firm to one of the partners: *In re G. H. Lane & Co.*, 10 B. R. 135.

27. If partners purchase land with partnership funds and take a deed to themselves jointly, as tenants in common, and the orphans' court, upon the death of one of them, orders his interest in the land to be sold, the proceeds do not belong to the assignee of the surviving partner. What was sold was the estate of the decedent, and not that of the partnership. The money is the proceeds of his estate. Whether the sale was of a moiety of the lands, the title of the decedent as a tenant in common, or his interest as a partner in the firm, the result is the same, and the assignee has no right to the money: Jones' Appeal, 70 Penn. 169.

28. A creditor holding a judgment against one partner acquires no lien upon firm property transferred to that partner at a time when the firm is insolvent: *In re Cook & Gleason*, 3 Biss. 122.

29. If the judgment of a partnership creditor against the firm is prior in point of time to the judgment of an individual creditor against one of the partners, the share which the partnership creditor is entitled to receive out of the partnership assets must be first applied as a credit on his judgment against the separate partner, in relief of the fund of such separate partner, for the benefit of the separate creditor: *In re A. T. Lewis*, 8 B. R. 546.

30. When a judgment has been obtained by a partnership creditor against the members of the firm, it operates as a several lien against the real estate of each partner, and if prior in point of time to a judgment obtained against an individual partner by an individual creditor of such partner is to be preferred to such subsequent judgment: *In re A. T. Lewis*, 8 B. R. 546.

31. The rule that appropriates partnership property to the payment of partnership debts is for the benefit of the partners, and they may waive it. A mortgage is not void as against partnership creditors, because the notes or debts which it was in fact given to secure were individual debts of the respective partners, and not properly a partnership demand: *In re Kahley*, 4 B. R. 378.

32. The presumption is, that an arrangement made by one partner to sell firm property, and, in consideration thereof, to receive goods for his own individual use, is entered into by both parties in fraud of the partnership. This presumption may be rebutted by showing an express or implied assent of the other partners, but without such proof the arrangement is void: *Taylor* v. *Rasch*, 5 B. R. 399.

33. If the separate estate of one partner is more than enough to pay his separate debts, at the amounts proved as they stood at the time of the adjudication of bankruptcy, the surplus of such separate estate over such debts is to be added to the partnership estate, and applied to the payment of joint debts before paying interest on the separate debts after that time: *In re Berrian*, 44 How. Pr. 216.

34. Each bankrupt must stand and fall by his own acts. Those of his partner committed without his knowledge will not affect him, excepting that a neglect to do what the law positively requires, such as keeping proper books, will affect both, though it should actually be the neglect of one only: *In re George & Proctor*, Lowell, 409.

35. This provision implies that the court which first obtains jurisdiction over

SEC. 36. The provisions of this Act shall apply to corporations,* and upon the petition of any officer of any corporation, duly authorized by the vote of the Board of Directors or Trustees, at a meeting specially called for that purpose, or by the assent in writing of a majority of the Directors or Trustees, as the case may be, or upon a creditor's petition, made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors. All the provisions of this Act, which apply to the debtor, or set forth his duties, examination, and liabilities, or prescribe penalties, or relate to fraudulent conveyances, payments, and assignments, apply to each and every officer of any corporation in relation to the same matters concerning the corporation. Whenever any corporation is declared insolvent, all its property and assets shall be distributed to the creditors; but no discharge shall be granted to any corporation.*

(*a*) This section construed as it reads is applicable to "private corporations * * * formed for any purpose for which individuals may lawfully associate themselves." C. C., sec. 286. Also it applies specially to all those corporations specially mentioned in Chapter I., Title I., C. C., viz.: Bank, Beneficial and Relief, Building, Business, Canal, Mutual Life, Health and Accident, Land and Building, Railroad, Prismoidal, Religious, Social and Benevolent, Road, Savings and Loan, Telegraph, Water and Canal.

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the subject-matter of the petition and over the person of the petitioner, shall have exclusive jurisdiction over the case; that is, over the subject-matter of the petition and over all the copartners, if the non-petitioning copartners are brought in by appropriate process: *In re Penn et al.*, 5 B. R. 30.

36. One partner can not file a petition against his copartners in the district where he resides, but in which they have neither resided nor carried on business during any portion of the six months next preceding the filing of the petition: *In re Work, McCough & Co.*, 30 Leg. Int. 361; *contra, in re Penn et al.*, 5 B. R. 30. .

37. Where the members of a firm reside in different districts, the only court that has jurisdiction of a petition against the firm is the district court of the district in which the firm carries on business: *Cameron* v. *Cameo*, 9 B. R. 527.

38. If proceedings to have the firm declared bankrupt are commenced in one district on the same day that proceedings in bankruptcy are commenced by one of the partners in another district, the assignee elected in the former proceedings is alone the proper assignee of the firm: *Cannon* v. *Wellford*, 22 Va. 195.

*U. S. R. S., Sec. 5122.—The provisions of this title shall apply to all moneyed business or commercial corporations and joint stock companies, and upon the petition of any officer of any such corporation or company, duly

authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor of such corporation or company, made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors. All the provisions of this title which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall, in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporation or company, in relation to the same matters concerning the corporations or company, and the money and property thereof. All payments, conveyances, and assignments declared fraudulent and void by this title when made by a debtor, shall, in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. Whenever any corporation, by proceedings under this title, is declared bankrupt, all its property and assets shall be distributed to the creditors of such corporations in the manner provided in this title, in respect to natural persons. But no allowance or discharge shall be granted to any corporation or joint stock company, or to any person or officer or member thereof.

1. When the petition of a corporation has been filed without the consent of the corporators legally obtained, an attaching creditor may file a petition, asking to have the proceedings dismissed: *In re Lady Bryan Mining Co.*, 4 B. R. 144.

2. Whether the officers who filed the petition were duly authorized to do so by a proper vote of the stockholders, is a question that can not be raised in a collateral action: *Davis* v. *R. R. Co.*, 13 B. R. 258.

3. Where papers having color of compliance with the State statutes have been filed with the proper State officers, which meet their approval, but are in fact so defective as to be incapable of supporting the corporation as against the State, they are, as against a subscriber to its capital, sufficient to constitute a corporation *de facto*, if supported by proof of user: *Upton* v. *Hansbrough*, 3 Biss. 417.

4. A resolution releasing the stockholders from liability for the balance due on their stock is fraudulent and inoperative when not made public: *Upton* v. *Hansbrough*, 3 Biss. 417.

5. No fraud or misconduct by the managers of a corporation can be set up by stockholders to defeat their liabilities to creditors on unpaid stock: *In re Republic Ins. Co.*, 3 Biss. 452.

6. A representation made by an agent at the time of taking a subscription, that no more than twenty per cent. would be called for, will not release the subscriber from his agreement: *Payson* v. *Withers*, 5 C. L. N. 445.

7. Stockholders are liable to be compelled to pay whatever remains unpaid upon their stock, whenever it becomes necessary that such payment should be made for the purpose of discharging the debts of the company, although the words "non-assessable" are written or printed across the face of the certificates. As between the company and its stockholders, this contract may be binding: *Upton* v. *Burnham*, 8 B. R. 221; S. C., 3 Biss. 520.

8. The mere assignment of a certificate does not, of itself, constitute the assignee a stockholder, or create a liability upon the part of such transferee to pay assessments upon the stock: *Upton* v. *Burnham*, 3 Biss. 431.

9. A certificate to a party, or registry of his name upon the stock register, is not absolutely necessary to constitute the legal relation or privity. The purchaser may waive it and be held liable, without either a certificate or registry of his name: *Upton* v. *Burnham*, 3 Biss. 431.

10. The provision requiring the transfer to be upon the books of the company, is for the benefit of the company, and the company can waive it; and if it is waived at the request of the holder of the certificate, or with his con-

sent, express, or complied, he is liable directly to the company for future assessments: *Upton* v. *Burnham*, 8 B. R. 221.

11. If the certificate is indorsed in blank, and passed from the original subscriber to others, the entry of the name of the holder upon the stock books is a waiver. The holder of a stock certificate, by assignment and blank transfer to him, becomes thereby clothed, not only with all the rights, but with all the obligations of a stockholder: *Upton* v. *Burnham*, 8 B. R. 221.

12. An attorney of a corporation who advises it to apply for the benefit of the bankrupt law, after the passing of an order by a State court restaining it from disposing of its funds, is guilty of a contempt to the State court: *Watson* v. *Citizens' Savings Bank*, 9 B. R. 458.

ARTICLE VI.

PROOF OF DEBTS.

SECTION

37. What debts may be proved; Rebate of interest.
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SEC. 37. All debts due and payable from the debtor at the time of the adjudication of insolvency, and all debts then existing but not payable until a future time, a rebate of interest being made, when no interest is payable by the terms of the contract, may be proved against the estate of the debtor.*

SEC. 38. All demands against the debtor for or on account of any goods or chattels wrongfully taken, converted, or withheld by him, may be proved and allowed as debts to the amount of the value of the property so withheld, from the time of the conversion.*

* U. S. R. S., Sec. 5067.—All debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. When the bankrupt is liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate.

1. A creditor proving a debt against the estate stands in the position of a plaintiff in a suit at law seeking to enforce the claim. The assignee may set up any defense which the debtor might: *In re Prescott*, 9 B. R. 385.

2. Interest can not be computed as against the general estate beyond the date of the adjudication. It is immaterial to the creditor at what time interest stops on his debt provided interest on all debts stops simultaneously: *In re Haake*, 7 B. R. 61.

3. The liability of a stockholder for the debt of a corporation is not a provable debt: *James* v. *Atlantic Delaine Co.*, 11 B. R. 390.

4. A note given to compensate another for indorsing a note for the maker, is valid: *Providence Co. Savings Bank* v. *Frost*, 13 B. R. 356. So is a subscription for a religious or charitable institution, if under the subscription expenses have been incurred on the faith of the subscription: *Capelle* v. *Trinity Church*, 11. B. R. 536.

5. A promissory note to deliver specific articles is a provable debt: *Chandler* v. *Windship*, 6 Mass. 310. Debts created by fraud and by defalcation are provable: *In re Rundell & Jones*, 2 B. R. 113.

6. A claim for services rendered by counsel for the bankrupt in opposing the petition in involuntary proceedings, is a provable debt: *In re N. Y. Mail Steamship Co.*, 2 B. R. 74, 554.

7. A claim for services by counsel for the bankrupt in the preparation of papers in voluntary bankruptcy is provable: *In re Evans*, 3 B. R. 261.

8. When the signatures of the officers of a corporation to an instrument are proved, and the corporate seal is attached, the seal is *prima facie* evidence that it was affixed by proper authority: *In re Kansas City Manuf. Co.*, 9 B. R. 76.

9. A partnership creditor may prove his claim against the estate of a partner: *In re Frear*, 1 B. R. 660.

10. A claim for money loaned by the wife of the bankrupt to him out of her separate estate may be proved. Equity will protect the rights of the wife even against the creditors of the husband. The court being satisfied that the money was the separate property of the wife, and was placed in the husband's hands as a loan or trust for the benefit and use of the wife, and not as a gift, will adjudge him to be her debtor to that amount, and will award payment to her as to any other creditor: *In re Bigelow et al.*, 2 B. R. 556; *In re Blandin*, 5 Id. 39; *In re David W. Jones*, 9 Id. 56. Gifts from the husband to the wife can not be offset against such a loan. If the gifts were disproportioned to the circumstances of the parties, or there were reasons to suspect the motives with which they were made, the court might marshal the gifts and offset them against the loan: *In re Bigelow et al.*, 2 Id. 556.

11. A mortgage taken in the name of the wife merely for the sake of convenience will not be deemed a settlement or advancement, and a subsequent use of the notes by the husband will not give the wife a valid claim against his estate: *In re David W. Jones*, 9 B. R. 56.

12. Where the husband, by the consent of his wife, is in the habit of receiving the income of her separate estate, the law presumes that she intended to thus dispose of them for the benefit of the family, and does not therefore imply a promise to repay them: *In re David W. Jones*, 9 B. R. 56.

13. If a corporation can not prove a note held by it against the bankrupt because the discounting of it was *ultra vires*, it may prove a demand for money loaned: *In re Jaycox & Green*, 7 B. R. 578.

14. Where a foreign creditor has obtained a judgment and levied an execution upon the personal property of the bankrupt in such foreign country after the commencement of proceedings in bankruptcy, if he seeks to prove his claim he must first refund what he has so acquired and come in equally with the rest of the creditors, or not at all: *In re Oliver Bugbee*, 9 B. R. 258.

15. If the debt of such foreign creditor consists of two claims, on one of which alone was such judgment obtained and execution issued, he can not prove either claim, for the whole debt of the creditor is considered the debt upon which the principle of equality operates: *In re Oliver Bugbee*, 9 B. R. 258.

16. A debt contracted by a *feme-covert* in a case where she was not authorized to incur it by the law of her domicile, is not provable: *In re Schlichter*, 2 B. R. 336; *In re Rachel Goodman*, 8 Id. 380.

17. The taking of the note of a third party for a debt, and the obtaining of a judgment thereon, extinguish the original debt, and make it the debt of the third party: *In re Hinds et al.*, 3 B. R. 351.

18. In order to entitle a third party to prove a note which was given without any valuable consideration, there must be some present consideration at the time of the transfer. He must show that he paid value when he took it, or incurred some responsibility, or relinquished some right, or granted some indulgence, or discharged a precedent debt upon the faith and credit of the paper: *In re Howard, Cole & Co.*, 6 B. R. 372.

19. If a party has broken the essential part of a contract, his claim thereon will be disallowed, for he must fulfill the essential part of his contract, or show that he has been released therefrom by the bankrupt, or prove that the bankrupt, and not himself, was the cause of his failure to comply therewith. If he fails to do this, he is without legal remedy or equitable redress: *In re Nounnan & Co.*, 7 B. R. 15.

20. The purchase of the right to deliver grain at a certain price before some future day is void as a wagering contract, if the parties do not intend to deliver the grain, but only at the utmost to settle the differences, and the holder can only prove for the purchase-money where the state laws on the subject of gaming allow the money paid to be recovered: *In re P. K. Chandler*, 9 B. B. 514.

21. A savings bank, which is prohibited from making a loan on personal security, can not prove a note taken for such loan: *In re Jaycox & Green*, 13 B. R. 122.

22. The contract is to be governed by the law of the place where the goods are accepted: *In re Paddock*, 6 B. R. 132.

23. A claim for goods sold under a contract made in another state by a

citizen of that state, and valid where it was made, may be proved in another state where the bankrupt resides, even though suit could not be maintained in the state where the petition is filed: *In re Murray*, 3 B. R. 765.

24. A debt is provable though it may be barred by the statute of limitations of the state where the petitioner resides: *In re Ray*, 1 B. R. 203; *In re Reed*, 11 Id. 94.

25. There is no law restricting the proof on a note to the amount paid for it: *In re Storms & Co.*, Lowell, 394.

26. A note made prior to the commencement of proceedings in bankruptcy, which was taken up after such proceedings were commenced, by the bankrupt's giving a new note, does not constitute a debt which may be proved by an indorser. If a creditor of the bankrupt, after the adjudication, accepts a new obligation from the bankrupt in substitution for the debt existing at the time of the filing of the petition, he relinquishes his claim upon the estate of the bankrupt, and must look to his debtor alone for the payment of his debt: *In re Montgomery*, 3 B. R. 429.

27. A debt upon which a judgment has been rendered since the commencement of proceedings in bankrutcy, may be proved. The debt is not extinguished. The debt remains. The debt was founded upon contract; it is now founded on judgment, but it is nevertheless the same debt. A judgment operates to extinguish a debt only when it produces the fruits of a judgment. It operates as a change of remedy merely. It is a security of a higher nature: *In re Crawford*, 3 B. R. 698; *In re Vickery*, Id. 696; *In re S. Brown*, Id. 584.

28. *Contra.* Neither the debt nor the judgment is provable. The debt is merged in the judgment, and the judgment did not exist at the time of the adjudication of bankruptcy: *In re Williams*, 2 B. R. 229; *Bradford* v. *Rice*, 102 Mass. 472; *In re Gallison et al.*, 5 B. R. 353; S. C., 2 L. T. B. 195; *In re Mansfield*, 6 B. R. 388.

29. It is not the judgment but the debt, as it existed on the day of the filing of the petition, that is provable: *In re Vickery*, 3 B. R. 696; *In re S. Brown*, Id. 584; *In re Louis H. Rosey*, 8 Id. 509.

30. *Contra.* The debt or claim, as it stood at the time of the filing of the petition, is merged in the judgment, and, therefore, the judgment must be proved. The judgment must be proved, not because it existed at a proper time, but because the debt constituting the foundation did exist at that time. The costs, however, which accrued subsequent to the time of the filing of the petition, can not be said to constitute a claim or debt which existed at that time, and should be excluded in making up the amount upon which dividends are to be declared: *In re Crawford*, 3 B. R. 698; *Monroe* v. *Upton*, 50 N. Y. 593.

31. It is not necessary for a creditor who recovered judgment after the adjudication of bankruptcy to strike out his judgment before he can prove the claim on which the judgment was recovered: *In re Stevens*, 4 B. R. 367.

32. A claim for damages for a purely personal injury is not provable, unless liquidated and transmitted into a legal debt by a judgment obtained before the adjudication of bankruptcy: *In re Hennocksburgh & Block*, 7 B. R. 37.

33. A judgment for a fine imposed by law for the commission of a crime is not provable. A judgment that a party pay a fine, in the absence of anything to the contrary, must be presumed to have been given as a punishment for the commission of a crime: *In re Sutherland*, 3 B. R. 314.

34. If the bankrupt wrongfully converted the property of another while he was legally in the possession thereof, a claim for damages for the conversion constitutes a provable debt: *Cole* v. *Roach*, 37 Tex. 413.

35. If there has been a trial in an action for damages arising from a breach of a contract, and a report of the judge fixing the amount of the damages and a taxation of the costs, so that the whole amount due has been ascertained, the demand is provable: *Monroe* v. *Upton*, 50 N. Y. 593.

36. A judgment obtained for a breach of promise to marry is provable: *In re Sidle*, 2 B. R. 220; *In re Daniel Sheehan*, 8 Id. 345.

37. Where the claim is for unliquidated damages, there must be an assessment of the damages by the court before the claim can be proved. The court is not called upon to order an assessment, unless the creditor applies for the same: *In re Clough*, 2 B. R. 151.

SEC. 39. If the debtor shall be bound as indorser, surety, bail, or guarantor, upon any bill, bond, note, or other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until the adjudication of insolvency, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared.*

SEC. 40. In all cases of contingent debts, and contingent liabilities contracted by the debtor, and not herein otherwise provided for, the creditor may make claim therefor and have his claim allowed, with the right to share in the dividends if the contingency shall happen before the order for the final dividend, or he may, at any time, apply to the Court to have the present value of the debt or liability ascertained and liquidated, which shall be done in such manner as the Court shall order, and shall be allowed to prove for the amount so ascertained.†

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* U. S. R. S., Sec. 5069.—When a bankrupt is bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, but his liability does not become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability becomes fixed, and before the final dividend is declared.

1. Indorsers who are liable in the second instance are included in the statute, and such a claim is provable: *McNiel* v. *Knott*, 11 Ga. 142.

2. A guaranty that if a claim can not be recovered from the debtor, the guarantor will pay it, is a provable debt: *Stone* v. *Miller*, 16 Penn. 450.

3. A bond given to release a debtor from arrest is not a provable demand where the liability becomes fixed after commencement of the proceedings in bankruptcy: *Woodard* v. *Herbert*, 24 Me. 358.

4. A sheriff who holds a bond of indemnity against liability for executing a *fi. fa.* has a provable debt if judgment was rendered against him in an action by the owner of the goods prior to the commencement of the proceedings in bankruptcy: *Wartmough* v. *Gilliams*, 1 Phila. 572.

5. A bond conditioned for the faithful performance of the duty of a public officer is not, prior to breach, a debt, and is not provable: *Loring* v. *Kendall*, 67 Mass. 305.

6. If the bankrupt puts another in possession of premises leased by him, but agrees to be accountable for the rent until they are relet, the claim for rent is provable: *In re Bruce*, 6 Binn. 515.

† U. S. R. S., Sec. 5068.—In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency happens before the order for the final dividend; or he may, at any time, apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained.

1. The phrase "contingent debt" means not demands whose existence depends on a contingency, but existing demands upon which the cause of action depends on a contingency: *French* v. *Morse*, 68 Mass. 111.

SEC. 41. Any person liable as bail, surety,[a] or guarantor,[b] or otherwise, for the debtor who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor, if he shall have proved the same, although such payments shall have been made after the proceedings in insolvency were commenced; and any person so liable for the debtor, and who has not paid the whole of said debt, but is still liable for the same, or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same in the name of the creditor.* ·

(*a*) Title XIII., Chapter I., C. C.
(*b*) Title XIII., Chapter II., C. C.

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2. The term "contingent demand" is only applicable where there is no claim *in presenti: Jemison* v. *Blowers*, 5 Barb. 686.

3. A contingent demand must be in a condition where its value can be estimated: *Woodard* v. *Herbert*, 24 Me. 358.

4. A joint debtor has a demand against a co-debtor contingent upon his being compelled to pay more than his share of the debt, and such demand is provable: *Clarke* v. *Porter*, 25 Penn. 141.

5. If a debt can not be enforced until the happening of some contingency, if the debt can be readily estimated, it may be proved: *U. S.* v. *Throckmorton*, 8 B. R. 309.

6. The liability of the sureties of a guardian attaches whenever the guardian receives property of his ward, and becomes a debt on and to the extent of the guardian's default, and is a contingent liability: *Jones* v. *Knox*, 8 B. R. 559.

7. A covenant in a deed to warrant the title against all liens or incumbrances is a provable demand: *Shelton* v. *Pease*, 10 Mo. 473.

8. A covenant against incumbrances is not a provable debt unless the breach occurs before the discharge of the bankrupt: *French* v. *Morse*, 68 Mass. 111.

9. A grantee taking land subject to incumbrances which may defeat it, has, before eviction, a contingent demand upon the covenant for quiet enjoyment, and the claim is provable even if breach occurs after the commencement of proceedings in bankruptcy: *Jemison* v. *Blowers*, 5 Barb. 686.

* U. S. R. S., Sec. 5070.—Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt or to stand in the place of the creditor if the creditor has proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of such debt, but is still liable for the same or any part thereof, may, if the creditor fails or omits to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the general orders, and subject to such regulations and limitations as may be established by such general orders.

U. S. R. S., Sec. 5091.—All creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate, pro rata, without any priority or preference whatever, except as allowed by section fifty-one hundred and one. No debt proved by any person liable, as bail, surety, guarantor, or otherwise, for the bankrupt, shall be paid to the

SEC. 42. Where the debtor is liable to pay rent, or other debt falling due at fixed and stated periods, the creditor may prove, for a proportionate part thereof up to the time of the insolvency, as if the same became due from day to day, and not at such fixed and stated periods.*

SEC. 43. In all cases of mutual debts and mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed and paid.[a] But no set-off or counter-claim shall be allowed of a claim in its nature not provable against the estate; *provided*, that no set-off or counter-claim shall be allowed in favor of any debtor to the insolvent of a claim purchased by or transferred to him after the filing of the petition by or against him, for the purpose of making such set-off or counter-claim.†

(*a*) Sec. 21, subn. 1, and note *a*.

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person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct.

1. A surety has a provable claim against the principal, although he has not paid the debt: *Mace* v. *Wells*, 7 How. 272.

2. The surety may prove his debt, although it does not fall due until after the commencement of proceedings in bankruptcy: *Hardy* v. *Carter*, 8 Humph. 153.

3. The solvent partner, who is liable with the bankrupt as maker of a joint and several note, may prove for his share of the indebtedness: *Butcher* v. *Forman*, 6 Hill, 583.

4. A surety upon an official bond has no claim against the officer until he has suffered an injury, in consequence of becoming surety: *Ellis* v. *Ham*, 28 Me. 385.

* U. S. R. S., Sec. 5071.—Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.

1. Rent accruing after bankruptcy can not be brought in question in the bankrupt court: *Wylie* v. *Beck*, 2 Woods, 678.

2. Rent should be allowed only up to the commencement of the proceedings in bankruptcy, and not to the time of adjudication: *Wylie* v. *Beck*, 2 Woods, 673.

3. The landlord's right to rent against the bankrupt's estate expires on the day of adjudication: *In re Webb & Co.*, 6 B. R. 302.

4. Where a lease stipulates that all unpaid rent shall be a mortgage lien upon the property on the premises, it creates an equitable lien that is valid against the assignee: *McLean* v. *Klein*, 3 Dillon, 113. It should be recorded as a chattel mortgage: *In re Dyke & Marr*, 9 B. R. 430. If the assignee takes possession before the landlord does, the lien is terminated: *Id.*

5. A reasonable compensation may be allowed the landlord for the use of premises after the commencement of proceedings in bankruptcy, where the estate has received a benefit to that amount: *In re Hamburger* v. *Frankell*, 12 B. R. 277.

† U. S. R. S., Sec. 5073.—In all cases of mutual debts or mutual credits

between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed in favor of any debtor to the bankrupt of a claim in its nature not provable against the estate, or of a claim purchased by or transferred to him after the filing of the petition, [or in cases of compulsory bankruptcy, after the act of bankruptcy upon or in respect of which the adjudication shall be made, and with a view of making such set-off.]

1. The term "mutual credits" in the bankrupt act, is more comprehensive than the term "mutual debts" in the statutes relating to the set-off. The term "credit" is synonymous with trust, and the trust or credit need not be of money on both sides: *Catlin* v. *Foster*, 3 B. R. 540.

2. If a banker, in the regular course of business, receives drafts for collection, he may retain the amounts so collected to pay an indebtedness due to him, although the money was collected after the commencement of the proceedings in bankruptcy: *In re Farnsworth, Brown & Co.*, 14 B. R. 148.

3. The claim may be set-off by the holder, although he has never proved it in bankruptcy: *Tucker* v. *Oxley*, 5 Cranch. 34.

4. A stockholder can not set off a claim held by him upon the corporation against a demand for an unpaid subscription for stock. The debts are not mutual. The debt due on the subscription is a trust fund devoted to the payment of all the creditors of the company. As soon as the company becomes insolvent, and the fact becomes known to the stockholder, the right of set-off for an ordinary debt, to its full amount, ceases: *Sawyer* v. *Hoag*, 17 Wall. 610; *Scammon* v. *Kimball*, 8 B. R. 337.

5. A party who has acted under a deed of trust, for the benefit of creditors, declared void as being contrary to the provisions of the bankrupt act, is entitled to set off the value of the services rendered by him under such deed against the claim for property that came to his hands under it, even though he did have notice of the act of bankruptcy committed by the bankrupt at the time of the rendering of the services: *Catlin* v. *Foster*, 3 B. R. 540.

6. A joint claim—that is to say, a debt due to several joint creditors—can not be set off against a debt due by one of them. If a debt is due to A. and B., how can any court compel the appropriation of it to pay the indebtedness of A. to the common debtor, without committing injustice towards B.? The debtor who owes a debt to several creditors jointly can not discharge it by setting up a claim which he has against one of those creditors, for the others have no concern with his claim, and can not be affected by it; and no more can one of several joint creditors, who is sued by the common debtor for a separate claim, set off the joint demand in discharge of his own debt, for he has no right thus to appropriate it. Equity will not allow him to pay his separate debt out of the joint fund: *Gray* v. *Rollo*, 18 Wall. 629; *Hitchcock* v. *Rollo*, 4 B. R. 690.

7. If A. and B. are indebted upon a joint note to a bankrupt insurance company, and B. and C. have a joint claim for a loss under a policy issued by the company, the claim under the policy can not be set off against the note, for there is neither a mutual debt nor a mutual credit: *Gray* v. *Rollo*, 18 Wall. 629.

8. The set-off can not be allowed in such a case even though the liability on the note is several as well as joint, and C. consents to the set-off: *Gray* v. *Rollo*, 9 B. R. 337.

9. A joint indebtedness may be proved and set off against the estate of either of the joint debtors who may become bankrupt, and the fact that it may be subject to be marshaled makes no difference. The joint debtors are severally liable *in solido* for the whole debt: *Gray* v. *Rollo*, 18 Wall. 629.

10. The partnership is a different thing from the partners themselves, and the debts of the firm are different in character from other joint debts. A joint debt incurred by all the partners can not be set off against a demand of the firm upon the creditor who holds the joint obligation. An illegal claim can not be set off: *Forsyth* v. *Woods*, 5 B. R. 78.

11. A debt payable *in futuro* can be set off against a debt payable *in presenti*. Though there are not debts mutually payable between the parties, there are mutual credits, and the case is within the equity of the statute: *In re City Bank*, 6 B. R. 71; *Drake* v. *Rollo*, 4 Id. 689.

SEC. 44. When a creditor has a mortgage or pledge of real or personal property of the debtor, or a lien thereon, for securing the payment of a debt owing to him from the debtor, he shall be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof,* to be made in such manner as the Court shall direct; or the creditor may release or convey his claim to the assignee, upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the debtor's right

(*a*) Sec. 21, subn. 4.

12. A claim for unliquidated damages can not be set off by the bankrupt against the claim of a creditor. The creditor has the right to prove his claim in full: *In re Orne*, 1 B. R. 57.

13. *Quære.* Can a party, by way of defense to an action by the assignee, plead and set off a claim which has been once presented for proof, and rejected? *Catlin* v. *Foster*, 3 B. R. 540.

14. When the assignee brings an action upon a demand due to the bankrupt, the defendant may plead a set-off to more or less of such demand, although the same has not been proved and presented to the assignee, and rejected by the judge, and appeal taken to the circuit court: *Catlin* v. *Foster*, 3 B. R. 540.

15. A party has the right to have his credit for a deposit in a bankrupt bank set off against his indebtedness as indorser upon a note held by the bank and duly protested. And if the parties before bankruptcy do what the law allows, and the indorser thus takes up the note, it can not be recovered from him: *Winslow* v. *Bliss*, 3 Lans. 220.

16. A bank may set off the amount due on a protested draft against a deposit made by the bankrupt, and need not pay such deposit to the assignee: *In re H. Petrie*, 7 B. R. 332.

17. Any collections in excess of the advances for which they were specifically pledged, made after the commencement of proceedings in bankruptcy, are collections for the account of the assignee, and as to them no right of set-off exists: *Clark* v. *Iselin*, 9 B. R. 19.

18. A creditor is entitled to retain money due to the bankrupt and apply it to his claim although he has attempted to obtain a preference thereon, for the debt is a valid debt against the bankrupt although it can not be proved, and the law allows and requires the set-off: *Clark* v. *Iselin*, 9 B. R. 19.

19. A creditor who has received and sold the goods of the bankrupt under an agreement to account for the same to a committee of creditors can not set off the balance due from him on the special account against the general balance due him from the creditor: *In re Troy Woolen Co.*, 8 B. R. 412.

20. Losses upon policies of insurance may be set off against money borrowed from the insurance company: *Drake* v. *Rollo*, 4 B. R. 689.

21. If the holder of a policy upon which there has been a loss is both the treasurer and the banker of the insurance company, he can not set off the claim on the policy against the funds in his hands although he paid interest on the deposits: *Scammon* v. *Kimball*, 8 B. R. 337.

22. A claim purchased before the filing of the petition in involuntary cases, or before the act of bankruptcy upon which the adjudication was made in involuntary cases, may be set off although the purchaser knew that the debtor was insolvent: *Hovey* v. *Home Ins. Co.*, 10 B. R. 224; *In re City Bank*, 6 Id. 71; *Contra*, *Hitchcock* v. *Rollo*, 4 Id. 690.

of redemption thereon on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon, and in either case the assignee and creditor respectively shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not sold or released, and delivered up, the creditor shall not be allowed to prove any part of his debt.*

* U. S. R. S., Sec. 5075.—When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary and proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt.

1. It is the intention of the act to produce equality among the creditors. In cases of extreme doubt the act should be construed beneficially in favor of the unsecured creditors: *In re Jaycox* v. *Green*, 8 B. R. 241.

2. A lien is a legal claim or charge on property for the payment of a debt or duty: *Downer* v. *Brackett*, 21 Vt. 599.

3. The indorser of a promissory note being secured by a mortgage upon the property of the bankrupt; the holder has a lien in equity upon such property to secure the payment of the debt, which he can directly enforce: *In re Jaycox* v. *Green*, 8 B. R. 241. A claim secured by the guaranty indorsement of collateral liability of a third person may be proved as unsecured: *In re Anderson*, 12 Id. 502; *In re Lloyd*, 15 Id. 257.

4. If the lien expires by the statute of limitations after the commencement of the proceedings in bankruptcy, the title of the assignee becomes absolute: *Bruner* v. *Sherley*, 27 Miss. 407.

5. A creditor, by filing a bill in chancery to reach the equitable or other assets of the debtor, obtains a lien thereon from the time of the service of process: *Clark* v. *Rist*, 3 McLane, 494; *Storm* v. *Waddell*, 2 Sandf. Ch. 494.

6. The lien acquired by filing a creditor's bill only extends to property which can not be reached on execution: *Johnson* v. *Rogers*, 15 B. R. 1.

7. The assignee's title is not affected by secret unrecorded liens: *Brock* v. *Terrell*, 2 B. R. 643.

8. A bank has a general lien on collaterals deposited to secure a particular debt, and may retain them as security for other debts: *In re Peebles*, 13 B. R. 149.

9. Liens depending upon possession are waived by a voluntary surrender of the property to the assignee: *In re Mitchell*, 8 B. R. 47.

10. If there are judgments, the priority of the lien on the real estate is determined by the order in which the judgments are obtained, and the priority of the lien on the personal property is determined by the order of the levy of executions: *Johnson* v. *Rogers*, 15 B. R. 1.

11. Where a third party has assigned his property to a creditor to secure the debt, he may require the creditor to first exhaust all the property of the bankrupt upon which he has a claim before proceeding against the property so assigned: *In re Santhoff & Olson*, 14 B. R. 364.

12. An attorney's lien on the papers of a bankrupt for professional services is preserved: *In re N. Y. M. Steamship Co.*, 2 B. R. 74. There is no lien on any papers for opposing the petition in involuntary bankruptcy: Id.

13. A vendor's lien will prevail against the assignee. The lien is not extinguished by taking notes, nor by obtaining judgment on the notes: *In re Perdue*, 2 B. R. 183. The lien is personal and not assignable: *In re Brooks*, 2 B. R. 466.

14. A vendor's lien is not waived by taking a mortgage on the land therefor, and takes precedence over a judgment lien obtained prior to the mortgage: *In re Bryan*, 3 B. R. 110.

15. An agreement that the vendor of land may collect the rents, and apply them to the payment of the purchase-money, is terminated by the appointment of an assignee: *Hall* v. *Scovil*, 10 B. R. 295.

16. A mechanic's lien may be filed after the commencement of proceedings in bankruptcy: *Clifton* v. *Foster*, 103 Mass. 233; *In re Sabin*, 12 B. R. 142.

17. When the material is not in fact used by the bankrupt in the building, the creditor must show that he sold it to be so used: *In re Cook & Gleason*, 3 Biss. 122. The amount required to finish a contract should be deducted from the stipulated price: *Id.* Nor can a claim be filed for work done after the filing of the petition in bankruptcy: *Id.*

18. Hauling quartz to be crushed in a mill is performing labor in carrying on the mill: *In re Hope Mining Co.*, 1 Saw. 710.

19. Liens created by state laws upon vessels are void: *In re Edith*, 6 B. R. 449.

20. The lien of a judgment is preserved: *Haworth* v. *Travis*, 13 B. R. 145.

21. Filing a transcript on Christmas is a mere ministerial act, and will give a valid lien: *In re Worthington*, 14 B. R. 388.

22. Under the laws of New York a judgment confessed to secure future advances is valid: *Cook* v. *Whipple*, 9 B. R. 155.

23. The lien of a levy made under an execution issued upon a final judgment, obtained without collusion, which attached before the commencement of proceedings in bankruptcy, is preserved: *In re Bernstein*, 1 B. R. 199; *In re Campbell*, Id. 165.

24. Mere delay in making a levy will not defeat the lien: *In re Weeks*, 4 B. R. 364.

25. The receipt of a second execution after the levy under the first, and while such levy remains in force, operates as a constructive levy under the second, and an actual levy is unnecessary: *In re Smith*, 1 B. R. 599.

26. A levy does not create a valid lien if the debtor is allowed to remain in possession of the property and exercise acts of ownership over it: *Barnes* v. *Billington*, 4 Day, 81.

27. The return of the sheriff is a matter of record, and therefore conclusive. If it is false, he is answerable for it to a proper party in a proper action; but its truth or falsity can not be inquired into in an action between other parties: *Armstrong* v. *Rickey Bros.*, 2 B. R. 473.

28. A mortgage executed by the officers of the corporation does not bind the corporation even as an equitable mortgage. It must be under seal: *In re St. Helen's Mill Co.*, 10 B. R. 414.

29. The assignee upon application of the mortgagee may be directed to pay to the mortgagee a reasonable compensation for the use of the mortgaged premises, as rents and profits: *Hutchins* v. *Muzzy Iron Works*, 8 B. R. 458.

30. Equitable liens are as much within the act as legal liens, unless there is some prohibition in the state laws which renders them invalid: *Parker* v. *Mayridge*, 2 Story, 334.

31. Every agreement for a lien or charge *in rem*, whether upon real or personal estate or money in the hands of third persons, constitutes a trust and may be enforced as an equitable lien: *Fletcher* v. *Morey*, 2 Story, 555.

32. Notice of application to sell incumbered property should be served on the secured creditor: *Foster* v. *Ames*, 2 B. R. 455.

33. On application of the assignee the district court may order incumbered property to be sold free from incumbrances, the lien being transferred to the fund in court: *In re Stewart*, 1 B. R. 278; *Houston* v. *City Bank*, 6 How. 486.

34. The court has jurisdiction to decree an erasure of the mortgages,

SEC. 45. No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the debtor, but shall be deemed to have waived all right of action and suit against him, and all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby; *provided*, that no valid lien existing in good faith thereunder shall be thereby affected; *and further provided*, that a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the debtor where a discharge has been refused, or the proceedings have determined without a discharge. And no creditor whose debt is provable under this Act shall be allowed, after the commencement of proceedings in insolvency, to prosecute to final judgment any action therefor against the debtor until the question of the debtor's discharge shall have been determined, and any such suit or proceeding shall, upon the application of the debtor, or any creditor, or of the assignee, be stayed to await the determination of the Court in insolvency on the question of discharge; *provided*, there be no unreasonable delay on the part of the debtor, or of the petitioning creditors, as the case may be, in prosecuting the case to its conclusion; *and provided, also*, that if the amount due the creditor is in dispute, the suit, by leave of the Court in insolvency, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proven in insolvency, but execution shall be stayed as aforesaid; *provided further*, that where a valid lien or attachment has been acquired or secured in any such such action, and an undertaking been offered and accepted in lieu of such lien or attachment, the case may be prosecuted to final judgment for the purpose of fixing the liability of the sureties upon such undertaking; but execution against the insolvent upon such judgment shall be stayed.*

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where the property is sold free from incumbrances: *Conrad* v. *Prieur*, 5 Rob. La. 49.

35. If a proceeding to foreclose a mortgage is instituted in a state court after the commencement of proceedings in bankruptcy, it may be stayed on the application of the assignee: *Markan* v. *Heany*, 12 B. R. 484.

* U. S. R. S., Sec. 5105.—No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bank-

SEC. 46. Any person who shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given; nor shall he receive any dividend thereon until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference.*

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rupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be deemed to be discharged and surrendered thereby. [But a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt where a discharge has been refused or the proceedings have been determined without a discharge.]

U. S. R. S., Sec. 5106.—No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge; and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed.

1. This provision does not interfere with the right of any creditor to proceed against the assignee under the bankruptcy to have the benefit of any mortgage, pledge, or other security *pro tanto*, if he elects to do so, or with the right of the assignee to redeem the same: *In re William Christy*, 3 How. 292.

2. Creditors who have proved their claims are temporarily barred from pursuing their claims against the bankrupt in any other form: *Dengee* v. *Beeker*, 9 B. R. 508.

3. In cases of voluntary bankruptcy, an application for a stay may be made as soon as the petition is filed; but no application can be made in involuntary proceedings until the order of adjudication is passed: *Maxwell* v. *Faxton*, 4 B. R. 220.

4. A claim in tort for personal injury can not be stayed, for it is not provable until first judgment is obtained: *In re Hennocksburg & Block*, 7 B. R. 37.

5. When an attachment was issued more than four months before the commencement of proceedings in bankruptcy, the proceedings for a judgment *in rem* against the property will not be stayed: *Mason* v. *Warthens*, 14 B. R. 341.

6. The suggestion of the defendant's bankruptcy operates as an injunction against the further prosecution of the suit, and such further proceeding must be deemed void while the injunction continues: *Penny* v. *Taylor*, 10 B. R. 200.

* U. S. R. S., Sec. 5084.—Any person who, since the second day of March, eighteen hundred and sixty-seven, has accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provisions of the act of March two, eighteen hundred and sixty-seven, chapter one hundred and seventy-six, to establish a uniform system of

bankruptcy, or to any provisions of this title, shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit, or advantage received by him under such preference.

1. The provisions of this section must be construed in connection with the clause in section 5021, which prohibits certain creditors from proving their debts, in such a manner that, if possible, both may stand. The construction which attains this end is that the clause in section 5021 applies only to cases in which the assignee is compelled to resort to legal proceedings to recover the property; that the creditor who claims to retain the property makes himself conclusively a party to the fraud by resisting the claim of the assignee to recover the property, in case the assignee is successful; but that, where the creditor avails himself of the *locus penitentiæ*, by voluntarily surrendering the property to the assignee, he ceases to be a party to the fraud and may prove his debt: *In re C. A. Davidson*, 3 B. R. 418; *In re H. B. Montgomery*, Id. 429; *In re Clark & Daughtrey*, 10 Id. 21.

2. A claim on account of which a preference has been accepted, would, but for this section, undoubtedly be provable. This section operates to suspend the right until the creditor holding a preferred claim shall first have surrendered to the assignee the preference received by him. When such surrender is made, the suspension ceases. The office of this clause, therefore, is in the first instance that of suspension merely, to ripen, however, into absolute prohibition in case of a refusal or neglect to surrender. Upon such surrender being made, the right of such creditor to prove his debt revives, and is in full force the same as if such suspension had never existed: *In re Scott & McCarty*, 4 B. R. 414.

3. It will not do to say that this clause is to be given effect in voluntary and not in involuntary cases, because that would involve the absurdity of saying that the quality and consequences of the act of the creditor in accepting a preference are to be measured and judged of not by the statute itself, but by what the debtor may see fit subsequently to do. It must be a strong necessity, growing out of positive and unmistakable provisions of the law, that would induce a court to adopt a construction leading to such unreasonable and inconsistent results: *In re Scott & McCarty*, 4 B. R. 414; *In re E. R. Stevens*, 6 Id. 533.

4. Until judgment has been had by judgment or decree, a preferred creditor may surrender, and his right to prove his debt against the bankrupt's estate and to receive dividends therefrom will, by such surrender, be revived and become binding on all concerned, regardless of the question whether a suit shall or shall not have been commenced against him by the assignee and be pending at the time of such surrender. It is immaterial whether there was a demand and refusal before suit was brought: *In re Kipp*, 4 B. R. 593; *In re Simeon Leland et al.*, 9 Id. 209.

5. Where the fraud is only constructive and not actual, the creditor should in equity have a reasonable opportunity of considering whether he will surrender his preference and pay all the costs and charges, but his decision must precede the final decree. The entry of the final decree may be suspended for a brief period to give him such an opportunity: *Hood* v. *Karper*, 5 B. R. 358; *Zahm* v. *Fry*, 9 Id. 546.

6. It may be a matter of discretion with the court whether a party shall be allowed to surrender after suit brought, and particularly after the testimony is taken, and the party becomes satisfied it is enough to defeat him. The spirit of the act does not warrant a practice of the kind. A party should not be allowed to experiment and speculate upon the ability of the assignee to prove a case against him, and when he sees that he has succeeded, then to plead guilty and make a surrender. Such a practice ought not to be tolerated. A party ought to elect, and having elected, will be held to his election. A surrender can not be made after suit brought except under very peculiar circumstances: *In re E. R. Stephens*, 6 B. R. 533.

7. A creditor may, of course, if he chooses, accept a preference. In doing so, however, he takes the chances of his debtor going into bankruptcy either voluntarily or involuntarily, and thus losing the advantage obtained. In

SEC. 47. The Court may, upon the application of the assignee, or of any creditor of the debtor, or without any application, before or after adjudication in insolvency, examine upon oath the debtor in relation to his property and his estate, and any person tendering or making proof of claims, and may subpena witnesses to give evidence relating to such matters. All examinations of witnesses[a] shall be had and depositions[b] shall be taken in accordance with and in the same manner as is provided by the Code of Civil Procedure.*

(*a*) Secs. 2042, 2070, C. C. P.
(*b*) Secs. 1981, 2038, C. C. P.

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such cases, all he has to do to remove the obstacle to proving his claim in bankruptcy, and to his standing on an equal footing with the other creditors, is simply to surrender such advantage to the assignee: *In re Forsyth & Murtha*, 7 B. R. 174.

* U. S. R. S., Sec. 5081.—The court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering, or who has made proof of a claim, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake.

U. S. R. S., Sec. 5086.—The court may, on the application of the assignee or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination, on oath, upon all matters relating to the disposal or condition of his property, to his trade and dealings with others, to his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate, and the due settlement thereof according to law. Such examination shall be in writing, and shall be signed by the bankrupt, and filed with the other proceedings.

U. S. R. S., Sec. 5087.—The court may, in like manner, require the attendence of any other person as a witness, and if such person fails to attend, on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person, and bring him forthwith before the court, or before a register in bankruptcy, for examination as a witness.

1. The court may make an examination of a creditor without any application therefor, and when it sees from the testimony before it that certain claims are improperly proved, it will reject them: *In re Lathrop et al.*, 3 B. R. 413.

2. The words "any creditor" must be held to mean not only a creditor who has proved a debt, but a creditor who has tendered proof of a debt which has not yet been allowed: *In re Ray*, 1 B. R. 203.

3. A note given by the bankrupt for the purpose of enlarging a creditor's dividend, is illegal, and this illegality of a portion of the consideration makes the whole note void and unavailable, so far, at least, as the interests of creditors are concerned: *In re Elder*, 3 B. R. 670; S. C., Saw. 73.

4. When a creditor, by a combination with the bankrupt, and in view of the commcement of proceedings in bankruptcy, fraudulently enlarges his claim

by taking fictitious notes, both the real and fictitious claim will be disallowed: *In re Elder*, 3 B. R. 670.

5. A claim which has its origin in a transaction entered into by the claimant with the bankrupt, for the purpose of delaying, hindering, or defrauding the creditors of the latter, is not provable: *In re E. R. Stephens*, 6 B. R. 533.

6. A claim which is valid independently of a fraudulent transfer is not merged thereby. When the transfer is set aside, the claim is revived, and may be proved: *In re E. R. Stephens*, 6 B. R. 533.

7. Claims which are purchased by an agent of the bankrupt are illegal and must be rejected: *In re Lathrop et al.*, 3 B. R. 413.

8. Creditors whose interests are affected by a judgment against their debtor, may avoid it collaterally, because they have no right to have it reviewed directly. In bankruptcy, the creditors are interested in contesting a judgment which is offered for proof in competition with their own debts, and may show, by any appropriate evidence, that the judgment is void or voidable for fraud or irregularity. A debtor might suffer judgment against him for the very purpose of affecting the proceedings in bankruptcy, or a judgment may be obtained for a just debt, but under circumstances which would make it a fraudulent preference. In all such cases it must be open to other creditors to object to the judgment when offered for proof against the assets: *Ex parte O'Neil*, 1 B. R. 677.

9. When a creditor presents his claim for proof, he at once subjects himself and his claim to the power and jurisdiction of the court, and both thereby become subject to the orders of the court under and within the provisions of the bankrupt act. When he is examined in respect to his claim, he is examined as a party to the proceedings: *In re Paddock*, 6 B. R. 132.

10. The words "any creditor" mean any creditor who has proved his claim: *In re Ray*, 1 B. R. 203.

11. The application for examination should be by petition. It need not state the particular matters to which the examination is to be directed: *In re Lanier*, 2 B. R. 154.

12. The petition on the part of a creditor should show good cause and be verified: *In re Adams*, 2 B. R. 95.

13. The petition on the part of the assignee need not show the grounds for the proposed examination, nor be verified. The bankrupt is the ward of the court, and the assignee a *quasi* officer of the court, and it is only necessary that the court should be satisfied of the *bona fides* of the assignee's application: *In re Lanier*, 2 B. R. 154.

14. Every creditor has the right to examine the bankrupt. The fact that one creditor has examined him is no reason for withholding the privilege from another creditor: *In re Adams*, 2 B. R. 272.

15. If a full examination has been had, a subsequent examination may be denied unless it is made to appear that the examination was either collusive, or deficient in some material particular: *In re Frisbie*, 13 B. R. 349.

16. When a bankrupt has been examined at considerable length by the assignee, and none of the creditors ask for an examination until the day appointed to show cause against the discharge, it would be unreasonable to require the bankrupt to submit to a new examination, especially when no reason for doing so is shown by the petition: *In re Isidore & Blumenthall*, 1 B. R. 264.

17. A voluntary bankrupt may be examined even prior to an adjudication in bankruptcy: *In re Parker*, 1 Penn. L. J. 370.

18. The power to examine a debtor prior to an adjudication of bankruptcy should not be exerted unless in a case of actual necessity: *In re Salkey & Gerson*, 9 B. R. 107.

19. The testimony of a bankrupt taken on his examination is a deposition: *In re Levy*, 1 B. R. 136.

20. The bankrupt is to answer substantially like a witness, and not merely to have interrogatories filed and propounded after the manner adopted in equity and admiralty. It is not intended that the bankrupt or his attorney shall write the answers, but merely that the depositions shall be reduced to writing: *In re Tanner*, 1 B. R. 316.

21. When satisfied that an examination has been sought, or is being carried

on, to gratify malice or mere curiosity, it is the duty of the court to arrest it: *In re Salkey & Gerson*, 9 B. R. 207.

22. The bankrupt may decline to answer a question where by answering he would criminate himself: *In re Patterson*, 1 B. R. 147; *in re Koch*, Id. 549.

23. The bankrupt must state whether or not he has played cards, faro, or any other game of chance with a certain person named in the interrogatory, and whether he has lost any money at games of chance, even though he declines to answer on the ground that his answers would criminate or degrade himself: *In re Richards*, 4 B. R. 93; S. C., 4 Bt. 303.

24. He must answer questions in relation to his wife's property when it is shown that he may possibly have an interest in it: *In re Craig*, 3 B. R. 100.

25. He can not be examined in relation to property acquired or business done after the date of filing of the petition in bankruptcy unless it can be shown that the same has some connection with his property or business before that time: *In re Rosenfeld*, 1. B. R. 319; *in re Levy*, Id. 136.

ARTICLE VII.

DISCHARGE.

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SEC. 48. At any time after the expiration of three months from the adjudication of insolvency, the debtor may apply to the Court for a discharge from his debts, and the Court shall thereupon order notice to be given to all creditors, who have proved their debts, to appear, on a day appointed for that purpose, and show cause why a discharge should not be granted to the debtor; said notice shall be given by mail* and by publication at least once a week, for four weeks, in a newspaper published in the county, or, if there be none, in a newspaper published nearest such county; *provided*, that if no debts have been proven, such notice shall not be required.*

(*a*) See sec. 7.

* U. S. R. S., Sec. 5108.—At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time

SEC. 49. No discharge shall be granted, or if granted shall be valid, if the debtor shall have sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in insolvency, in relation to any material fact concerning his estate, or his debts, or to any other material fact; or if he has concealed any part of his estate or effects, or any books or writings relating thereto; or if he has been guilty of fraud or willful neglect in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this act, or if he has caused or permitted any loss or destruction thereof; or if, within one month before the commencement of such proceedings, he has procured his lands, goods, money, or chattels to be attached, or seized on execution; or if he has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to the making of any false or fraudulent entry in any book of account or other document with intent to defraud his creditors; or if he has given any fraudulent preference contrary to the provisions of this act, or made

after the expiration of sixty days, and [before the final disposition of the cause], the bankrupt may apply to the court for a discharge from his debts.

U. S. R. S., Sec. 5109.—Upon application for a discharge being made, the court shall order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt.

1. The six months is to be computed from the date of adjudication, not from the date of filing the original petition: *In re Bodenheim & Adler*, 2 B. R. 419.

2. The bankrupt is not required to pray for a discharge from his partnership debts in precise words. If he prays to be discharged from all his provable debts, he virtually prays to be discharged from his partnership debts: *In re W. H. Pierson*, 10 B. R. 107.

3. The notices are to be sent only to the creditors who have proved their debts: *In re McIntire*, 1 B. R. 151; *Morse* v. *Presby*, 25 N. H. 299.

4. The clerk's certificate that the notices have been duly mailed is sufficient evidence of the fact: *In re Bellamy*, 1 B. R. 64; *In re Townsend*, Id. 216. The proof of publication may be made by the usual affidavit of the printer: *In re Bellamy*, Id. 96; 1 Ben. 426.

5. The allegation in the record that due proof of the publication of the notices was made can not be impeached in a collateral action: *Lenton* v. *Stanton*, 4 La. An. 401.

any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property; or has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate, or if, having knowledge that any person has proven such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge; or if, being a merchant or tradesman, he has not, subsequently to the passage of this act, kept proper books of account,[a] or if he, or any other person on his account or in his behalf, has influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation; or if he has, in contemplation of becoming insolvent, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under this act in satisfaction of his debts; or if he has been convicted of any misdemeanor under this act, or has been guilty of fraud contrary to the true intent of this act;[b] or in case of volun-

(*a*) See *Moore* v. *His Creditors*, note *a*, sec. 6.

(*b*) A conveyance of property made and received with intent to defraud creditors is void, though there may have been a full and valuable consideration paid therefor. The fraud taints and vitiates it, and it will not be allowed to stand even as security for advances actually made: *Sorinford* v. *Rogers*, 23 Cal. 233.

A conveyance of real estate, made and received for the purpose of defrauding the creditors of the grantor, is good between the parties, and as to all the world, except the creditors of the grantor. Such conveyance is good as against subsequent purchasers from the grantor, unless they buy without notice and for a valuable consideration: *Lawton* v. *Gordon*, 34 Id. 36.

A deed obtained through fraud and duress is only voidable, and a *bona fide* purchaser from the vendee in such deed, for a valuable consideration, without notice of the fraud or duress, will hold the property: *Deputy* v. *Stapleford*, 19 Id. 302.

Proof of fraudulent intent on the part of donor is sufficient

tary insolvency has received the benefits of this or any other act of insolvency or bankruptcy within three years next preceding his application for discharge. And before any discharge is granted, the debtor shall take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified in this act, as ground for withholding such discharge or as invalidating such discharge, if granted.[c] *

to avoid the deed, as against an innocent donee: *Swartz* v. *Hazlett*, 8 Id. 118.

As against subsequent creditors, a conveyance, even if voluntary, is not void, unless fraudulent in fact; that is, made with a view to future debts; though the evidence of an intent to defraud existing creditors is deemed sufficient *prima facie* evidence of fraud against subsequent creditors: *Horn* v. *Volcano Water Co.*, 13 Id. 62.

A. and B. were partners, and as such, owned two tracts of land. A. for several years had resided upon one of the tracts with his family, using it as a homestead. The firm becoming embarrassed, they made a division of their lands, and B. executed to A. a deed of his interest in the homestead tract, and A. executed to B. a deed of his interest in the other tract. These deeds were executed for the purpose of enabling A. to file a declaration of homestead on the tract deeded to him, and thereby preventing the creditors from selling it in payment of their debts. A., soon after, executed and recorded a declaration of homestead on the land: *Held*, that the conveyances were fraudulent and void as to creditors; and that, notwithstanding the homestead claim, the land was still liable for the debts of the firm: *Bishop* v. *Hubbard*, 23 Id. 514.

Fraud may consist in the misrepresentation or the con-

* U. S. R. S., Sec. 5110.—No discharge shall be granted, or, if granted, shall be valid in any of the following cases:

1. If the bankrupt has willfully sworn falsely in his affidavit, annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact.

2. If the bankrupt has concealed any part of his estate or effects, or any books or writings relating thereto, or has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this title, or if he has caused, permitted, or suffered any loss, waste, or destruction thereof.

3. If, within four months before the commencement of such proceedings,

cealment of material facts, and may be inferred from the circumstances and condition of the parties contracting: *Belden* v. *Henriques*, 8 Id. 87.

In order to sustain the allegations of fraud and deceit in contracting a debt, it is necessary to prove that the representations alleged to have been fraudulent and deceitful, were not true: Id.

To constitute fraud, actual notice is necessary, or such acts in the premises as some positive statute characterizes as fraudulent: *Dennis* v. *Burritt*, 6 Id. 670.

A slight mistake in the computation of interest, the date being given, is no evidence of fraud: *Scales* v. *Scott*, 13 Id. 76.

Even where there is no intention to deceive, there may be such an amount of gross carelessness as to constitute conclusive evidence of a fraudulent intent: *Alvarez* v. *Brannan*, 7 Id. 503.

The statute does not contemplate conclusive proof of the intention to commit a fraud: *White* v. *Leszynsky*, 14 Id. 165.

In cases of fraud, subsequent acts are frequently resorted to for the purpose of showing antecedent fraud. Fraud being proven in reference to the transaction under question, the criminal intent is necessarily a matter of inference for the jury. The dealing with property to-day by the vendor, as his property, is evidence to show the fraud committed in a sale a month ago. The subsequent acts are il-

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the bankrupt has procured his lands, goods, money, or chattels to be attached, sequestered, or seized on execution.

4. If, at any time after the second day of March, eighteen hundred and sixty-seven, the bankrupt has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writings, or securities, or has made or been privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors; or has removed or caused to be removed any part of his property from the district, with intent to defraud his creditors.

5. If the bankrupt has given any fraudulent preference contrary to the provisions of the act of March two, eighteen hundred and sixty-seven, to establish a uniform system of bankruptcy, or to the provisions of this title, or has made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, or has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate.

6. If the bankrupt, having knowledge that any person has proved such false or fictitious debt, has not disclosed the same to his assignee within one month after such knowledge.

7. If the bankrupt, being a merchant or tradesman, has not at all times after the second day of March, eighteen hundred and sixty-seven, kept proper books of account.

8. If the bankrupt, or any person in his behalf, has procured the assent of

lustrative of the intent and character of the first: *Butler* v. *Collins*, 12 Id. 45.

In an action where one of the issues raised is a question of fraudulent intent in the sale or disposition of the property, the fraudulent intent is a question of fact alone, to be left solely to the determination of the jury: *Miller* v. *Stewart*, 24 Id. 502.

When fraud is charged, express proof is not required; it may be inferred from strong presumptive circumstances: *McDaniel* v. *Baca*, 2 Id. 326.

Courts will not defeat rights of property on the ground of fraud, unless the fraud be made plainly apparent: *Joyce* v. *Joyce*, 5 Id. 161.

Inadequacy of price, though a fact admissible in evidence to establish fraud, is never of itself sufficient to annul a sale under execution: *Smith* v. *Randall*, 6 Id. 47.

In an assignment for the benefit of creditors, a power to the assignee to sell on credit is presumptive evidence of fraud: *Billings* v. *Billings*, 2 Id. 107.

Where, on the trial of an issue of fraud, on the ground that a certain judgment confessed by B. to plaintiff was fraudulent as against the creditors of B., evidence that on the day of his confession of judgment to plaintiff, and in the same court, B. confessed other judgments, one to G., and another to F. & G., the papers therefor, in the three

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any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obligation.

9. If the bankrupt has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment, or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed in satisfaction of his debts.

10. If the bankrupt has been convicted of any misdemeanor under this title.

U. S. R. S., Sec. 5113.—Before any discharge is granted, the bankrupt must take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified as a ground for withholding such discharge, or as invalidating such discharge if granted.

U. S. R. S., Sec. 5116.—No person who has been discharged, and afterward becomes bankrupt on his own application, shall be again entitled to a discharge whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three-fourths in value of his creditors who have proved their claims, is filed at or before the time of application for discharge; but a bankrupt who proves to the satisfaction of the court that he has paid all the debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors, shall

cases, being all prepared by the same attorneys, was properly admitted to show that the confessions of the three judgments were but parts of one transaction and in pursuit of a common purpose; and such evidence would, therefore, be properly retained or excluded from consideration accordingly as defendant, who offered the same, succeeded or failed in adducing any proof that said judgments to G. and F. & G. were confessed for a like fraudulent purpose. If there was any proof whatever, the question would be for a jury; otherwise, for the court on motion to strike out: *King* v. *Davis*, 34 Id. 100.

The testimony showing a fraudulent design in a vendor of goods, is admissible under the allegations of an answer charging that the sale was made to defraud creditors, although it does not connect the purchaser with the fraud, or show that he was cognizant of such fraudulent design: *Landecker* v. *Houghtaling*, 7 Id. 391.

It is never presumed that a party has committed a fraud; and where fraud is alleged for the purpose of depriving him of a right, it must be clearly made out: *McCarthy* v. *White*, 21 Id. 495.

The fact that the purchaser of the property of a person actually insolvent, having been formerly an agent or clerk of the latter, does not necessarily raise the inference that his purchase was fraudulent; *aliter*, if he had taken an un-

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be entitled to a discharge in the same manner and with the same effect as if he had not previously been bankrupt.

1. The acts enumerated in this section are not in the nature of offenses. The section operates, and has been uniformly held to operate, upon debts created before as well as after its passage. If a debtor fully complies with the provisions, he is entitled to a discharge, provided he is not brought within the limitations, exceptions, or prohibitory provisions of the act, and as this right only exists by virtue of the bankrupt act, the provisions of this section are only exceptions in restriction or limitation of the grant of power to the bankrupt court, under which grant alone a debtor can, in any case not excepted from its operation, assert a right to a discharge: *In re Cretien*, 5 B. R. 423.

2. If the creditors do not enter an appearance and file specifications, they are regarded as not opposing the discharge, and as assenting to it: *In re Schuyler*, 2 B. R. 549.

3. Fraud in the creation of a debt is no ground for withholding a discharge: *In re Rathbone*, 1 B. R. 324; *In re Rosenfeld*, Id. 575; *In re Wright*, 2 Id. 41; *In re Bashford*, Id. 73; *In re Clark*, Id. 110; *In re Doady*, Id. 201; *In re Stokes*, Id. 212.

4. Neither the purchase of goods, when the bankrupt knew he could not pay for them, nor the fraudulent purchase of a piano, is within this act The frauds which prevent a discharge are nearly all such as tend to the injury of creditors generally. One who has been induced by fraudulent representations to sell goods to the bankrupt, finds his remedy in the right to receive a dividend, and hold the remainder of his debt undischarged by the certificate: *In re W. M. Rogers*, 3 B. R. 564.

5. The question of the residence or place of business of the bankrupt may

fair advantage of the knowledge given by that position, or if it appeared that he had no apparent means to make the purchase: *Kinder* v. *Macy*, 7 Id. 206.

A conveyance giving a preference is not fraudulent, though the debtor be insolvent, and the creditor be aware at the time that it will have the effect of defeating the collection of other debts. To avoid the conveyance, there must be a real design on the part of the debtor to prevent the application of his property, in whole or in part, to the satisfaction of his debts. A creditor violates no rule of law when he takes payment or security for his demand, though others are thereby deprived of all means of satisfaction of their own equally meritorious claims: *Dana* v. *Stanfords*, 10 Id. 269.

A conveyance giving a preference to one creditor is not fraudulent, simply because the debtor is insolvent, and the creditor is aware at the time that it will have the effect of defeating the collection of other debts: *Wheaton* v. *Neville*, 19 Id. 41.

R., being in insolvent and embarrassed circumstances, sold certain property to the plaintiff, in order to discharge certain debts which were liens upon his homestead, for the purpose of saving it to himself, of all of which the plaintiff was aware at the time he made the purchase: *Held*, that the sale, being with the direct intent of benefit or advantage to the seller, and to the injury of the creditors, is

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be made the ground for opposing the discharge. The question of residence is a question of jurisdiction: *In re Little*, 2 B. R. 294; *In re Penn*, 3 Id. 582.

6. It should be charged that the bankrupt has willfully sworn falsely in relation to his residence. The false oath may be made the ground for withholding the discharge: *In re Burk*, 1 Deady, 425.

7. The specification must aver that the false oath was willful and material: *In re Rathbone*, 1 B. R. 324; *In re Aschinbraun*, 12 Id. 17.

8. Mere oversight and mistake are not fraud: *In re McVey*, 2 B. R. 257; *Smith* v. *Bickford*, 5 Id. 20.

9. It is not willful and fraudulent to omit the name of a creditor from the schedule, if the creditor either expressly or by implication assents: *In re Needham*, 2 R. R. 387.

10. The omission to place upon the schedules property in which it can not be positively determined that the bankrupt has any interest, is no ground for withholding the discharge: *In re Wyatt*, 2 B. R. 288; *In re Penn*, 5 Id. 288.

11. There is a distinction between willfully swearing false and the crime of perjury. Perjury is the willfully and corruptly swearing false: Corruption is an element of crime. The advice of counsel may shield a client from corrupt intent, but can not relieve him from the fact that he actually intended what he did: *In re Rainsford*, 5 B. R. 381; *Robinson* v. *Wadsworth*, 49 Mass. 67; *Suydam* v. *Walker*, 16 Ohio, 122.

12. The specification should state with some particularity what property has been concealed: *In re Mawson*, 1 B. R. 437; *Stewart* v. *Hargrove*, 23 Ala. 429; *Brereton* v. *Hall*, 1 Denio, 75; *Dressar* v. *Brooks*, 3 Barb. 429.

13. The act of concealment must be shown to be intentional: *In re Wyatt*, 2 B. R. 288; *Dressar* v. *Brooks*, 3 Barb. 429.

14. It is not willful concealment of property to omit from the schedules a

fraudulent and void as to such creditors: *Riddell* v. *Shirley*, 5 Id. 488.

A sale under such circumstances, except to a creditor in payment of his debt alone, and free from knowledge of, or collusion with, the object of the debtor, must be considered a fraud in fact and in law: Id.

Upon the issue of fraud, in an application of an insolvent to be discharged from his debts, where it was alleged that the applicant had made and recorded a sham deed of his property shortly before his application, which property was not included in his schedule: *Held*, that it was error for the court to instruct the jury, "that to find the charge of fraud sustained, they must believe the deed made with the intent to defeat, hinder, or delay creditors, and to have been actually delivered to the grantees; that proof of record was no proof of delivery," etc. The fraud is as complete without the delivery as with it: *Fisk* v. *His Creditors*, 12 Id. 281.

Where, under the fourth section of the attachment act of 1858, defendant puts in issue the truth of the facts alleged in the affidavit, to wit, "That defendant was about fraudulently to convey his property to hinder, delay, or defraud creditors;" proof that defendant was able to pay the debt, that he put plaintiff off from time to time, and

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mass of obsolete and worthless demands, upon which no action can be maintained: *In re Pearce*, 21 Vt. 611.

15. The concealment denounced by this section embraces a concealment of title to property, as well as the hiding from view of property itself. Undoubtedly, concealment of property may be effected by the literal hiding of it. But the most dangerous sort of concealment is when the debtor places the title to property in the hands of another person to hold for his benefit, and conceals his beneficial right to it. Either kind of concealment will preclude the granting of a discharge: *In re Hussmann*, 2 B. R. 437.

16. It is concealment to leave out of the schedules property that has been conveyed by the bankrupt in fraud of creditors. It is wholly immaterial that the title, as between vendor and vendee, vested in the vendee. As to creditors, the conveyance was void, and the title remainded in the vendor. Concealment is a continuous act: *In re Hussmann*, 2 B. R. 437; *in re Rathbone*, 1 B. R. 536, 2 Id. 260; *in re W. D. Hill*, 1 Id. 431; *in re Goodridge*, 2 Id. 324; *in re Goodfellow*, 3 Id. 452.

17. A fraudulent conveyance made by a debtor anterior to the passage of the act will not of itself preclude his discharge, but in such case he should not conceal nor attempt to conceal the fraud when he seeks the benefit of the statute. He must come into court with clean hands, or at least with a clear conscience, and disclose fully all property and rights of property which the creditors may appropriate in satisfaction of their claims: *In re Hussmann*, 2 B. R. 437; *in re Rainsford*, 5 Id. 381.

18. If property which had been conveyed to defraud creditors was sold in good faith and the purchase money paid to the bankrupt or his creditors before the commencement of proceedings in bankruptcy, there is no concealment of assets by omitting it from the schedules: *In re J. H. C. Lutgens*, 7 Pac. L. R. 89.

19. When property is, in fact concealed, *in specie*, or where the title is con-

threatened to assign his property for the benefit of his creditors, if sued, is sufficient to go to the jury on the question of fraud: *White* v. *Beard*, 6 Id. 664.

There is no particular sanctity about a sealed instrument which will estop a party from alleging fraud in the execution or in the obtaining of it; on the contrary, fraud is a legitimate defense at all times and in all proceedings, at least under our system: *Hopkins* v. *Beard*, 6 Id. 664.

An attorney at law took an assignment of a lot, upon which there was a lien for purchase-money, after suit brought against the assignee for recovery of the money. The attorney defended the suit throughout all its stages, without disclosing his claim. Judgment was rendered for the plaintiff, and all the right, title, and interest of the defendant in the lot was sold by the sheriff, and purchased by the plaintiff. The attorney then set up his claim to the lot, then in possession of his tenant, refusing to pay rent in arrear, and denying that under the circumstances any lien existed. In a new suit, in which he was made a party, in view of these facts, it was held that his silence in relation to his own claim throughout his connection with the former suit, was a fraudulent concealment; and he was decreed to deliver possession to the plaintiff, and pay all the costs of this and the former suits, and the rent in arrear

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cealed by a colorable conveyance, the discharge can not be granted. An open and notorious conveyance of property from the bankrupt to his wife, made long before the commencement of proceedings in bankruptcy, and at a time when he is alleged to have been solvent, is no ground for withholding a discharge. Such a conveyance does not stand on the footing of a mere voluntary conveyance to a stranger, or of one made on a secret trust for the grantor. No doubt the debtor has always had, and always will have, some advantage from it, but it would be a perversion of terms to say that there was any concealment about it. Whether the conveyance can be avoided by the assignee is a different question: *In re Murdock*, 3 B. R. 146.

20. A transfer of property from the bankrupt to his wife, at a time when he was insolvent, but believed himself to be solvent, may be a good ground for refusing a discharge. If he surrenders the property as soon as the mistake is discovered, he will stand in a favorable condition; but if he does not do so, nor make any attempt to repair the error, it will be difficult to believe that the transfer was a mere mistake: *In re R. A. Adams*, 3 B. R. 561.

21. The keeping of books from the assignee involves the question of intent. If the books were accidentally lost before the bankruptcy, there can have been no such concealment. If they were not lost, but within the control of the bankrupt, and not given up on demand, with intent to prevent the assignee from obtaining them, but their existence denied, the charge of concealment is sustained. It is not necessary that they should have been put in any unusual or out-of-the-way place: *Hammond & Coolidge*, 3 B. R. 273.

22. Fraud by concealing assets is one that can seldom be proved by other than circumstantial evidence. Of course, those who would commit a fraud would swear falsely to carry it through. If their positive testimony to the honesty of the transaction is overborne by badges and *indicia* of fraud, the conclusion must be that there was fraud. If their positive testimony to the honesty of the transaction is true, there will not be found in their testimony

from the date of the sheriff's sale: *Truebody* v. *Jacobson*, 2 Id. 269.

Where judgment is confessed on a note, a portion of the consideration being advanced from time to time after the date of the note, which drew interest on the whole amount from date, a portion of the interest is fraudulent, and the entire note is void against creditors: *McKenty* v. *Gladwin, Hugg & Co.*, 10 Id. 227.

If the creditors of a failing debtor agree between themselves, with the assent of the debtor, to a composition of their respective debts, and to receive in lieu thereof securities of a certain character, and one of the creditors subsequently obtains from the debtor new notes, of a character more favorable to the creditor than those provided for in the composition agreement, such new notes are void for fraud, not only as to the other creditors, but as to the assenting debtor: *Smith* v. *Owens*, 21 Id. 11.

Where a party knowingly misrepresents material facts, the law will not permit him to derive any benefit from the transaction: *Alvarez* v. *Brannan*, 7 Id. 503.

The husband, when free from debts and liabilities, may make a gift to his wife of either real or personal property, which at the time was the common property of the husband

any badges and *indicia* of fraud sufficient to overbear such positive testimony: *In re Goodridge*, 2 B. R. 324; *in re Rathbone*, 1 Id. 536; 2 Id. 260; *in re Doyle*, 3 Id. 782; *in re Long*, 3 Id. 66.

23. Property held *de facto*, though by a defeasible title, should be placed upon the schedules. It is not for the bankrupt to rely upon the title of a third person which he himself has not respected: *In re Beal*, 2 B. R. 587.

24. Property conveyed to the bankrupt in fraud of the creditors of the grantor is assets: *In re O'Bannon*, 2 B. R. 15.

25. The right to a share in the net profits of a business conducted in the name of the bankrupt is not assets any more than the right of a clerk to his salary: *In re Beardsley*, 1 B. R. 457; *in re Wm. H. Pierson*, 10 Id. 107.

26. It may be shown that the debts omitted were against insolvent and irresponsible persons. The value of the assets has a material bearing on the question whether he has honestly surrendered all his property: *Cook* v. *Moore*, 65 Mass. 213.

27. Proof of ownership of property prior to the commencement of the proceedings in bankruptcy, and of possession after that time, raises a presumption of ownership at that time, and makes it the duty of the bankrupt to show what disposition had been made of it: *Powell* v. *Knox*, 16 Ala. 364; *Selby* v. *Gibson*, 3 La. An. 209.

28. The possession of property by the bankrupt immediately after the commencement of the proceedings in bankruptcy, which by industry he might reasonably have acquired, will not warrant the presumption that he did not make a full surrender of his estate. But where the value is so great as to make it improbable that it was earned by him since that time, it devolves upon him to show how he became the proprietor of such property, whether by inheritance, bequest, or purchase. The burden of proof is thrown on him who is best acquainted with the origin and nature of his title: *Hargraves* v. *Cloud*, 8 Ala. 173; *Ashley* v. *Robinson*, 29 Id. 112; *Gilbert* v. *Bradford*, 15 Id. 769.

29. Under the bankrupt act, the bankrupt, before the appointment of an

and wife, and the same will become her separate property, and will not be liable for debts by him afterwards contracted: *Peck* v. *Brummagim*, 31 Id. 440.

A deed of trust made by a debtor in favor of his wife at a time when he is insolvent, and his property under attachment, is fraudulent and void as to creditors: *Burpee* v. *Bunn*, 22 Id. 194.

A mortgage knowingly given for a sum greater than is due, and not in good faith, as a pretended security for future advances, is fraudulent in law as to the creditors of the mortgage: *Tully* v. *Harloe*, 35 Id. 302.

If a sale of property is made which is fraudulent as to creditors of the vendor, and the vendee then sells to a third person, in whose hands the goods are attached by a creditor of the first vendor, and the creditor, in an action against the sheriff, attacks the sale as a fraud on creditors, this admits the validity of the sales as between the vendors and vendees, and the creditor must show that the second vendee was a party to the fraud. The burden of proving the fraud is on him; and the questions whether the second vendee had notice of the fraud of the first sale, or was an innocent purchaser, or whether the second vendee paid a valuable consideration, have no application to the case. Such questions apply only to a case where property is purchased by

assignee, is the custodian of the estate, and must act, if at all, in the interest of the creditors: *March* v. *Heaton*, 2 B. R. 180; *In re Stedman*, 8 Id. 319.

30. Every kind of fraud is carefully prohibited, but not extravagance or waste, except gaming: *In re W. M. Rogers*, 3 B. R. 564.

31. The neglect of the debtor, without fraud, to turn over to the assignee certain worthless books of account, is no ground for withholding his discharge: *In re W. H. Pierson*, 10 B. R. 107.

32. A bankrupt has the right to employ counsel for the purpose of preparing the petition and schedules, and to raise the money to pay him a reasonable compensation therefor, and such compensation is valid: *In re Thompson*, 13 B. R. 300.

33. In regard to the first four of the clauses of this section, relating to the grounds for withholding a discharge, it may be conceded that the character of the acts therein described requires that they should have been committed after the passage of the bankrupt act. In the fifth clause there is an express limitation of time, which only requires that the act therein described should have been committed within four months before the commencement of proceedings in bankruptcy, and as a petition could have been filed at the end of three months after the passage of the act, it can hardly be said that the act referred to in this clause must have been committed after the passage of the bankrupt act, in order to bring the bankrupt within the prohibition of the section. The next clause by its express terms is limited to acts committed since the passage of the statute, and as the succeeding clauses—the seventh and the eighth—are only connected with it by the disjunctive "or," the same may be said in regard to those clauses. This actual and distinct expression of a limitation to acts committed after the passing of the statute, would seem to evidence an intention on the part of the legislature, that the clauses in which there is no such limitation, either expressed or necessarily to be inferred, should not be so limited. In the next or ninth clause there is a change of

such fraudulent representations as will vitiate the sale between the vendor and vendee: *Thornton* v. *Hook*, Id. 223.

The statute of frauds does not annul a sale in favor of creditors, solely upon the ground that it was not founded on a valuable consideration: Id.

A creditor who attacks a sale on the ground of fraud as to him, admits the validity of the sale between the parties thereto, but seeks the benefit of the statute of frauds as to himself, and must show fraud: Id.

The fraudulent intent of a party to procure goods without payment is consummated when the possession of the goods is obtained without payment on delivery, or on call, according to the terms of sale. The debt, under such circumstances, is fraudulently contracted: *Stewart* v. *Levy*, 36 Id. 159.

The question whether a mortgage given for a greater sum than is due was given in good faith, both for a present indebtedness and to secure future advances to be made, is one of fact for the jury under proper instructions from the Court: *Tully* v. *Harloe*, 35 Id. 302.

A conveyance made by a debtor *without consideration*, for the purpose of defrauding his creditors, can be set aside by

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phraseology, which was not necessary unless it was intended to disconnect its provisions from the limitations of time contained in the three next preceding clauses. If not so intended, the connection with the sixth, seventh, and eighth clauses would have been made by the use of the word, or, alone, as in the seventh and eighth clauses; but the words "if he" are inserted apparently *ex industria* to so far disconnect this clause from those immediately preceding, as to remove it from the limitation of time expressed in the sixth clause. The subsequent insertion in the thirteenth clause of the words "subsequently to the passage of this act," is also a significant indication that the legislature intended no such or similar limitations to the clauses where no limitation was expressed, or necessarily to be implied from the nature or character of the acts described, and in the fourteenth and sixteenth clauses the words "if he" are inserted as indicating a partial but distinct separation of these clauses from the preceding one, so as to disconnect them from any limitation of time contained in the preceding clauses: *In re Cretien*, 5 B. R. 423.

34. The mutilation of books by third persons after the termination of the business does not bar a discharge: *In re W. H. Pierson*, 10 B. R. 107.

35. In order to deprive a party of his discharge, it must appear that he had good grounds for believing he was insolvent, and acted under such belief. He must have intentionally given a preference to secure a particular creditor when he was not able to pay all his debts: *In re Gray*, 2 B. R. 358; *Everett* v. *Stone*, 3 Story, 446; *In re Foster*, 2 B. R. 232.

36. If the preferred creditor surrenders all he receives, the bankrupt is relieved from the charge of giving a preference: *In re Batchelder*, 3 B. R. 150.

37. If the payment is made under a mistaken sense of duty, or through inadvertence, without fraudulent intent, the bankrupt will not be deprived of his discharge: *In re Rosenfeld*, 2 B. R. 117; *In re Burgess*, 3 B. R. 196.

38. Making payments, *bona fide*, in the regular course of business, expecting to keep along without going into bankruptcy, will not deprive a party of his discharge, although he was insolvent when the payments were made: *In re Brent*, 8 B. R. 444; *In re Alonzo Pearce*, 21 Vt. 611.

39. A preference made by an alien when he was a resident of a foreign

the creditors on the ground of fraud, even if the grantee was ignorant of the fraudulent purpose for which it was given: *Lee* v. *Figg*, 37 Id. 328.

A sale of his land by a debtor, to defraud a creditor, operates as a fraud on the creditor only to the extent of the interest which the creditor would have acquired, by purchase at a sale under execution, of the property fraudulently conveyed: *Moore* v. *Besse*, 43 Id. 511.

There is no legal presumption that a conveyance of land, made by the husband to the wife, is fraudulent as against a judgment creditor of the husband, whose judgment was recovered after the conveyance: *Hussey* v. *Castle*, 41 Id. 239.

Where the point in issue in a case was whether a deed directed by a husband to be made to his wife, inured as a gift to her or not: *Held*, that it was for the Court to decide upon the husband's intentions from his acts and conduct at the time: and that a question to him, as to what his intentions had been, was properly excluded as immaterial: *Woods* v. *Whitney*, 42 Id. 361.

A deed of gift of community property, of the value of four thousand dollars, made by a husband worth one hundred thousand dollars, to his mother, in consideration of love and affection, is not unreasonable in amount: *Lord* v. *Hough*, 43 Id. 581.

If a husband, pending a suit for a divorce, procures his mother to live with him and take charge of his infant chil-

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country is a ground for opposing the discharge, for he must show that he has complied with the conditions imposed by law, although he was not aware of them, and was not subject to the law when he did the act. In coming here for the benefits of a discharge from his debts, he adopts the law, and must take it as he finds it. There is no distinction between citizens and aliens in this respect. A citizen who owns property and carries on business in other countries can not do acts which are perfectly lawful there and still obtain the benefits of the statute if the acts are such as will be a bar to the discharge: *In re Goodfellow*, 3 B. R. 452.

40. The application of money on deposit with a bank to pay a note held by it, is a preference, especially when the payment is made before the note becomes due: *In re Warner*, 5 B. R. 414.

41. A bankrupt, shortly before filing his petition, gave his wife a considerable sum of money to meet the family expenses. This was fraudulent: *In re Jorey & Son*, 2 B. R. 668.

42. Property acquired in gaming is assets; and if the bankrupt spent it in gaming, he loses his right to a discharge. If property once in the possession of the bankrupt has been spent in gaming, which, if not so spent, might be assets in bankruptcy, the case is made out. It is too late after it is spent to say that it was unlawfully acquired, or acquired in a particular way, or that the creditors are no worse off on the whole: *In re Marshall*, 4 B. R. 106.

43. The placing of a fictitious debt upon the schedules as just and owing, is admitting the debt against the estate within the meaning of the statute: *In re Deloin*, 5 Law Reporter, 370.

44. If the objection is that certain entries are wanting, or that there are irregularities in the mode of keeping proper books, they ought to be pointed

dren, on a promise of providing for her, and makes her a deed of a portion of the community property, these circumstances show that he is not actuated by a fraudulent intent towards his wife in making the deed: *Lord* v. *Hough*, Id.

A deed of gift of a portion of the community property made by the husband is not void *per se: Lord* v. *Hough*, Id.

If a husband, who is free from debt, purchase property with community funds and direct the conveyance to be made to his wife, with intent to make it her separate estate, the deed will take effect as a gift; and if the conveyance be, on its face, an ordinary deed of grant, bargain, and sale, reciting a valuable consideration, it is competent to show by parol the real facts in order to rebut the presumption that it is common property: *Woods* v. *Whitney*, 42 Id. 358.

If the husband purchase an estate and pay for it out of the common property, and cause it to be conveyed to the wife by a deed of bargain and sale, with intent that it shall become her separate property, it operates as a gift from the husband to the wife: *Higgins* v. *Higgins*, 46 Id. 259.

If A. when in insolvent circumstances conveys his personal property to B. for the purpose of defrauding his creditors, and B. has knowledge of these facts, and A. is afterwards, on the petition of his creditors, declared a bankrupt under the laws of the United States, the sale of the goods by A. to B. is void, and the title to the same vests in the

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out in the specification; but where the objection is, that a cash account is wholly wanting, a general specification is sufficient: *In re Littlefield*, 3 B. R. 57; *In re Hammond & Coolidge*, Id. 273.

45. A specification averring that the bankrupt has not kept proper books of account in his business, in that such books do not show what moneys were received, or what disposition was made of the same, is sufficiently specific to admit evidence that no cash-book whatever was kept for a period of time: *In re Belis et al.*, 3 B. R. 496; *In re Bound*, 4 Id. 510.

46. The law intends that a merchant's or trader's books and documents should be in such a condition as to show his business situation to his creditors as well as to himself. By keeping such books in a proper manner, a debtor can not but be aware of his standing, his property and effects, and his liabilities. On the other hand, his books should exhibit to his creditors his position, so that, when placed before them for investigation, they may at once ascertain his standing and property, and the result of his business, and whether everything has been fair and honest on his part: *In re Gay*, 2 B. R. 358; *In re Newman*, Id. 302; *In re Solomon*, Id. 285: *In re Keach*, 3 Id. 13.

47. A party, whose only business is that of speculating in stocks, is not a merchant or tradesman if he keeps no office and buys and sells through brokers: *In re William H. Marston*, 5 Bt. 313.

48. A stair-builder is a merchant or tradesman. He is none the less a tradesman because he is also a manufacturer of the stairs, or because he does not resell the lumber and other materials in the same state in which he buys them, or because he does not buy and sell completed stairs: *In re Edward Garrison*, 7 B. R. 287.

49. A person buying and selling goods for the purpose of gain, though only occasionally, is a merchant and trader: *In re O'Bannon*, 2 B. R. 15.

50. The distinction taken in England, whether every one who buys and

assignee in bankruptcy, when appointed, and he may recover possession of the same: *Bolander* v. *Gentry*, 41 Id. 545.

The property of a railroad corporation is vested in its trustees, to be preserved by them as a fund to secure the creditors of the corporation.

If the persons interested in one railroad corporation form a new one which chooses for its officers the officers of the corporation, and the persons owning the stock of the old corporation receive, in exchange therefor, stock of the new, and the trustees then cause the property of the old corporation to be conveyed to the new, the conveyance is a fraud upon the creditors of the old corporation.

The party who comes into a court of equity to enjoin a sheriff from selling real estate on an execution against the plaintiff's grantor can not obtain relief if his purchase is tainted with fraud: *S. F. and N. P. R. R. Co.* v. *Bee*, 48 Id. 399.

The *bona fides* of the sale of property made by a debtor can not be inquired into in an action brought by one who claims the property under a sheriff's sale made under a

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sells goods is *quoad hoc* a tradesman, may admit of question. And yet it is very difficult to draw any line founded solely on the smallness of the transactions. It would seem that any one who buys on credit with intent to sell again at a profit, and who has no other regular business, is fairly within the mischief of the act. Though where the buying and selling are a mere incident, as if a farmer should buy stock or grain in addition to what he had raised, perhaps such a person could not be described as a tradesman: *In re Tyler*, 4 B. R. 104. A person who bought goods which he could use, and did use, and which he sold when pressed for money, can not be deemed a trader. Isolated and separate acts, having no connection with each other, and showing no intention to set up any trade, do not make a person a tradesman. The deliberate purpose of buying goods to sell them again might be within the letter of the act. So might an amount of trading, however small, connected with an intent to deal generally: *In re Rogers*, 3 B. R. 564.

51. A person whose occupation is that of a baker, and who buys flour which he converts into bread, and then sells the bread to daily customers, is a tradesman: *In re Cocks*, 3 Bt. 260.

52. If a firm has not kept proper books of account, a partner can not obtain a discharge, although he was a junior member and not a keeper of the books: *In re W. H. Pierson*, 10 B. R. 107.

53. The final winding up of a trader's business should be recorded, as well as its current course, and, unless the bankrupt can clearly show that everything has been so fully ended that no such account could affect his standing, or touch the interests of his creditors at the time of his bankruptcy, the omission to keep proper books, which at the time of his trading was an illegal act, will be an effectual bar to his discharge: *In re Tyler*, 4 B. R. 104.

54. This is a most important provision, because it is that which is intended to provide the assignee representing the creditors with the means of tracing out all the dealings of the debtor, to ascertain what has become of his property, what are the causes of his failure, and whether he has dealt fairly and equally with his creditors. However harshly the law may sometimes operate with some small traders, whose affairs seem hardly worthy of the trouble of

judgment in favor of a creditor of the seller, recovered after the sale took place: *William Quinn* v. *L. G. Smith et al.*, 49 Id. 163.

If a debtor makes a sale of his personal property to one of his creditors, with an understanding that out of the proceeds of a sale of the property the creditor shall retain enough to pay his own debt, and then pay certain other creditors, and then pay the balance of the proceeds over to the debtor, and this sale is made to prevent other creditors from attaching the property, it is actual fraud, and vitiates the sale as to other creditors: *Hugh Menton* v. *J. H. Adams et al.*, 49 Id. 620.

Inadequacy or failure of consideration is not of itself sufficient, even as against the creditors of an insolvent assignor, to authorize a court to find fraud as a conclusion of law: *Jamison* v. *King*, 50 Id. 132.

The question of fraudulent intent in the sale of chattels is one of fact, and not of law; and the sale of all a debtor's goods, with credit for the greater portion of the purchase-price, does not establish fraud as a legal conclusion: *Harris* v. *Burns*, 50 Id. 140.

(*c*) See notes to secs. 55, 56.

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recording them, it is a most reasonable and salutary rule in its application to merchants dealing with large sums and contracting large debts, and in a position to know and to be able to carry out the law: *In re George & Proctor*, Lowell, 409.

55. The intent of the non-keeping of books is of no importance. The mere omission is the thing plainly interdicted. Such omission prevents a discharge, whether the intent was fraudulent or not: *In re Solomon*, 2 B. R. 285; *In re Newman*, Id. 302; *In re Jorey & Son*, Id. 668; *In re Schumpert*, 8 Id. 415.

56. No excuse, however true, and no innocence of intention, will avail to supply the deficiency: *In re George & Proctor*, Lowell, 409.

57. Whether the books of account are properly kept is a question which must be decided in each case upon the facts as they appear, and not upon any strict rule that such and such books and such and such entries are essential in all cases: *In re Perry & Allen*, 20 Pitts, L. J. 184.

58. It is not necessary that these books be kept in the form taught in schools, or in ledgers and day-books bound in leather. In business of some kinds any contemporaneous written memorials, formal or informal, of a tradesman's transactions, whether in a bound volume or in detached sheets, may answer the definition of proper books of account, if they have been preserved and so arranged as to present an intelligible and substantially complete exposition of his affairs. The question what are proper books, must be, in each case, a question of evidence. What would be proper and sufficient books in one case would be improper and insufficient in another: *In re Solomon*, 2 B. R. 285; *In re Newman*, Id. 302; *In re White*, Id. 590; *In re Batchelder*, 3 Id. 150.

59. Entries upon numerous slips of paper, each entry being on a separate slip, is not a keeping of books under the law. This may do for a short time in the absence of books, but not as a system or policy of a permanent character. If the books were lost, and there was no reasonable expectation of finding them, or if they were not found within a reasonable time, it was the duty of the bankrupt to supply their place with others: *In re Hammond & Coolidge*, 3 B. R. 273.

SEC. 50. Any creditor opposing the discharge of a debtor shall file specifications,[a] in writing, of the grounds of his opposition, and after the debtor has filed and served his answer thereto, which pleadings shall be verified, the court

(*a*) It is at this stage that the creditors may raise issue as to any matter contained in the petition or schedules. And the right is not affected by the failure to name any creditor; such omission does not bar any right; he may intervene or oppose the discharge: *Lambert* v. *Slade*, 4 Cal. 337. Indeed, it is suggested in at least one of the ad-

60. A retail dealer who keeps the usual books and all his invoices, keeps proper books of account, although he kept no invoice-book: *In re Reed*, 12 B. R. 390.

61. A cash account is necessary to an understanding of a trader's business, and where one has not been kept a discharge will be refused: *In re Gay*, 2 B. R. 358; *In re Solomon*, Id. 285; *In re Littlefield*, 3 Id. 57; *In re Bilis & Milligan*, Id. 496.

62. Careless omissions or mistakes, without fraud, in books themselves proper, may be overlooked: *In re W. F. White*, 2 B. R. 590; *In re Burgess*, 3 Id. 196.

63. A specification which avers that the bankrupt or some person in his behalf has procured the assent of certain creditors to his discharge, and influenced their action by a pecuniary consideration, is too vague to be triable: *In re Freeman*, 4 B. R. 64.

64. If the bankrupt obtains the consent of a creditor to a discharge by giving him his indorsed note for a part of the debt, his discharge will be refused, although he had previously procured the assent of a sufficient number to entitle him to a discharge: *In re Palmer*, 14 B. R. 432.

65. An examination of the act, in connection with the forms, shows that the expression, "becoming bankrupt," means committing an act of bankruptcy, and that the expression, "in contemplation of becoming bankrupt," means in contemplation of committing an act of bankruptcy. The act of bankruptcy, the commission of which must be contemplated, is such an act as the statute declares to be an act of bankruptcy. A debtor may become bankrupt or commit an act of bankruptcy by filing a petition under section 5014, or by doing some one of the things which is declared by section 5021 to be the commission of an act of bankruptcy. It is not necessary, in order that he should have contemplated becoming bankrupt, that he should have contemplated having a petition filed against him, and being adjudged a bankrupt thereon, provided he contemplated committing an act which is defined by section 5021 to be an act of bankruptcy, or filing a petition under section 5014: *In re Goldschmidt*, 3 B. R. 165; *In re Freeman*, 4 Id. 64; *In re Lawson*, 2 Id. 113; *In re Cretien*, 5 Id. 423; *In re J. H. C. Lutgens*, 7 Pac. L. R. 89; *In re W. H. Pierson*, 10 Id. 107.

66. A debtor may sell property for the purpose of procuring means to defray his expenses in contemplated bankruptcy proceedings, provided he does not sell at a sacrifice, and that the sum so raised is reasonable in amount: *In re Keefer*, 4 B. R. 389.

67. An assignment for the benefit of creditors by a party in contemplation of becoming bankrupt is good ground for refusing a discharge. The fact that the assignment is one of all the debtor's property and creates no preferences among his creditors makes no difference. It is as repugnant to the act as if it had assigned only a part of his property, or had created preferences. It shows an intent and a purpose on the part of the bankrupt to assume the distribution of his property in satisfaction of his debts through the agency of an assignee selected by himself. This necessarily involves the existence of a purpose to prevent the same property from being distributed under the bankrupt act in satisfaction of the same debt. There could be no other purpose: *In re Goldschmidt*, 3 B. R. 165; *contra*, *In re Pierce & Holbrook*, Id. 258.

shall try the issue or issues raised, with or without a jury, according to the practice provided by law in civil actions.*

judged cases that it is here that objection should be taken to any ambiguity or meagerness of detail in the schedules: *Wilson* v. *His Creditors*, 32 Id. 406.

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* U. S. R. S., Sec. 5111.—Any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may, in its discretion, order any question of fact so presented to be tried at a stated session of the district court.

1. The burden of proof is on the opposing creditor in support of his specifications. Creditors who wish to oppose discharge must appear at the return day: *In re Smith*, 5 B. R. 20. But see *In re Levin*, 14 Id. 385. Specifications in opposition to a bankrupt's discharge must be as precise as those of an indictment: *In re Butterfield*, Id. 147. And if not filed in accordance with the law they will be disregarded: *In re Buxbaum*, 13 Id. 478. Creditors who have not proved their debts can oppose discharge of bankrupt, but they must show that they are *bona fide* creditors: *In re Bontelle*, 2 Id. 129.

2. Any person who shows that he is a creditor may oppose a discharge notwithstanding his debt has not been proved: *In re Sheppard*, 1 B. R. 439; *Smith* v. *Bickford*, 8 Blatch. 461. *Contra*, *In re Levy et al.*, 1 B. R. 327.

3. A judgment obtained after the adjudication creates a new debt which can not be proved. The judgment is a merger. The creditor can not oppose the discharge because his debt has not been proved: *In re Gallison*, 5 B. R. 353.

4. The proceedings upon an order to show cause may be adjourned, and the rights of the creditor upon the adjourned day are the same as upon the return day: *In re John Thompson*, 1 B. R. 323; *In re Tallman*, Id. 540.

5. Until the appearance of the creditor is entered he has no standing in court as to the petition for discharge, and can not be heard in opposition to it: *In re R. A. Sutherland*, 1 Deady, 573.

6. If the creditor did not receive notice of the application for a discharge, he may be allowed to enter an appearance after the return day: *In re Lewis Levin*, 14 B. R. 385.

7. If the original objector declines to prosecute his specifications, other creditors may be permitted to enter their appearance and be heard in support of the objections, although the time for entering an appearance is passed: *In re S. S. Houghton*, 10 B. R. 337.

8. When there is no opposing party, the petition of the bankrupt for final discharge may be continued from time to time to suit the convenience of the bankrupt: *In re Southerland*, 1 Deady, 573.

9. The allegations must be distinct, precise, and specific. They must advise the bankrupt of what facts he must be prepared to meet and resist: *In re Rathbone*, 1 B. R. 294; *In re Beardsley*, Id. 304; *In re Buck*, 1 Deady, 425. The facts should be set out without reference to any matter *aliundi*: *In re Eidom*, 3 B. R. 106. They may be amended: *In re W. D. Hill*, 1 Id. 275; *In re Buck*, 1 Deady, 425.

10. The bankrupt may question the sufficiency in law of the grounds of opposition to his discharge by demurrer, or by exceptions: *In re Buck*, 1 Deady, 425.

11. The burden of proof is on the creditor: *In re Hill*, 1 B. R. 275.

12. The creditor is bound by his specifications. He cannot go beyond them, or produce evidence outside of them: *In re Rosenfield*, 2 B. R. 117; *Timothy* v. *Reed*, 21 Vt. 635.

13. A creditor assenting to illegal act of bankrupt is estopped from opposing his discharge: *In re Schuyler*, 2 B. R. 549.

14. A person not a creditor when property was removed, or whose debt was barred, cannot object. As to him there was no fraud: *In re Buck*, 1 Deady, 425.

15. A bankrupt whose discharge has been refused, may, upon the repeal of the bankrupt law, apply for the benefit of a state insolvent law: *Fisher* v. *Currier*, 48 Mass. 424.

SEC. 51. If it shall appear to the court that the debtor has in all things conformed to his duty under this Act, and that he is entitled under the provisions thereof to receive a discharge, the court shall grant him a discharge from all his debts, except as hereinafter provided, and shall give him a certificate thereof, under the seal of the court, in substance as follows: In the Supreme Court of the County of ———, State of California. Whereas, ——— has been duly adjudged an insolvent under the insolvent laws of this state, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said ——— be forever discharged from all debts and claims, which by said insolvent laws are made provable against his estate, and which existed on the —— day of ———, on which the petition for adjudication was filed by (or against) him, excepting such debts, if any, as are by said insolvent laws excepted from the operation of a discharge in insolvency. Given under my hand, and the seal of the court, this —— of ———, A. D. 18—. Attest, ———, Clerk. [Seal.] ———, Judge.*

SEC. 52. No debt created by fraud or embezzlement of the debtor, or by his defalcations as a public officer, or while acting in a fiduciary character, shall be discharged under this Act, but the debt may be proved, and the divi-

*U. S. R. S., Sec. 5114.—If it shall appear to the court that the bankrupt has in all things conformed to his duty under this title, and that he is entitled, under the provisions thereof, to receive a discharge, the court shall grant him a discharge from all his debts, except as hereinafter provided, and shall give him a certificate thereof under the seal of the court.

U. S. R. S., Sec. 5115.—The certificate of a discharge in bankruptcy shall be in substance in the following form: District court of the United States, district of ———. Whereas, ——— has been duly adjudged a bankrupt, under the revised statutes of the United States, title "Bankruptcy," and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said ——— be forever discharged from all debts and claims which by said title are made provable against his estate, and which existed on the —— day of ———, on which day the petition for adjudication was filed by (or against) him; excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy. Given under my hand and the seal of the court at ———, in the said district, this —— day of ———, ——. (Seal.) ———, Judge.

1. Before the bankrupt can obtain his discharge, he must have complied with all the requirements of the act. It is not enough that he has personally done what he is required to do: *In re Bellamy*, 1 B. R. 64; *In re Orne*, Id. 79.

2. It is the duty of the court to examine the record before granting the discharge, and to refuse it if it appears that he is not entitled to it, even though creditors do not object: *In re Wilkinson*, 3 B. R. 286.

dend thereon shall be a payment on account of said debt; and no discharge granted under this Act shall release, discharge, or affect any person liable for the same debt for or with the debtor, either as partner, joint contractor, indorser, surety, or otherwise.[a, b] *

(*a*) A debt contracted in a fiduciary capacity can not be discharged under the United States Bankrupt Act: *Treadwell* v. *Holloway*, 46 Cal. 547.

One who receives goods consigned to him on commission to be sold, if he sells the same, and fails to transmit the money to the consignor, creates a debt in fiduciary capacity: Id.

(*b*) The United States bankrupt law of 1841 provided: "All persons whatsoever, residing in any state, territory, or district of the United States, owing debts which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity, shall on a compliance," etc., be discharged. Forsyth was sued in assumpsit for the proceeds of one hundred and fifty bales of cotton shipped to and sold by him as the property of Chapman, Forsyth being a factor. Forsyth pleaded that he had been discharged as a bankrupt on his own petition. On appeal, the United States Supreme Court held "that a factor who receives the money of his principal is not a fiduciary, within the meaning of the act:" 2 How. 202.

A bankrupt is bound to state upon his schedule the

3. The granting of a discharge may be suspended until the assignee shall have filed and settled his accounts. It is part of the bankrupt's duty to his creditors to see that the assignee's account is exhibited in proper season: *In re Pierce & Holbrook*, 3 B. R. 258.

4. When it appears that the bankrupt innocently omitted the names of certain creditors from his schedule, he must make an amendment by inserting such names before a discharge will be granted: *In re Redfield*, 2 Ben. 72.

5. A discharge will be refused if the bankrupt omits from his schedule debts which he claims are barred by the statute of limitations: *In re John Cashman*, 7 Ben. 482.

6. The discharge does not take effect until it is signed by the judge: *Peson* v. *Passmore*, 4 Yeates, 139.

* U. S. R. S., Sec. 5117.—No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.

U. S. R. S., Sec. 5118.—No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise.

1. If the record shows that the debt was created by contract, the plaintiff

SEC. 53. A discharge, duly granted under this act, shall, with the exceptions aforesaid, release the debtor from all claims, debts, liabilities, and demands, set forth in his schedule, or which were or might have been proved against his estate in insolvency, and may be pleaded by a simple averment, that on the day of its date such discharge was granted to him, setting forth the same in full, and the same shall be a complete bar to all suits brought on any such debts, claims, liabilities, or demands, and the certificate

nature of his debt, if it be a fiduciary one. Should he omit to do so, he would be guilty of a fraud, and his discharge will not avail him; but if a creditor in such case proves his debt, and receives a dividend from the estate, he is estopped from afterward saying that his debt was not within the law. But if the fiduciary creditor does not prove his debt, he may recover it afterwards from the discharged bankrupt, by showing that it was within the exceptions of the act: Id.

A guarantor is not exonerated by the discharge of his principal by operation of law, without the intervention or omission of the creditor: Civil Code, sec. 2825.

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can not, when a discharge is pleaded in bar to the judgment, be allowed to show that the debt sought to be collected was created by fraud: *Palmer* v. *Preston*, 45 Vt. 145; *Sherman* v. *Strauss*, 34 N. Y. 52; Id. 404.

2. An attorney collecting a debt is a fiduciary: *Heffren* v. *Jayne*, 39 Ind. 463, 471. An auctioneer also: *Jones* v. *Russell*, 44 Ga. 460. And a guardian: *Carlin* v. *Carlin*, 8 Bush. 41; *Halliburton* v. *Coster*, 55 Mo. 435. A surety upon a guardian's bond is not: *Jones* v. *Knox*, 8 B. R. 559; 46 Ala. 53. An executor who guarantees a decedent's debt is not: *Amoskeag Mf'g Co.* v. *Barnes*, 49 N. H. 312.

3. Proceedings against others are not affected by the creditor proving the debt against the estate: *In re Levy*, 1 B. R. 327; *Payne* v. *Able*, 4 Id. 220. The contract of a surety, as it is understood in the commercial world, is conditioned that the surety shall not be discharged by the bankruptcy of the principal, and the provisions of the act are only in furtherance of and declaratory of what would have been true had they not been put in the act: *Phillips* v. *Solomon*, 42 Ga. 192.

4. If goods were consigned to the bankrupt to sell on commission, and he failed to account for the proceeds, this is a fiduciary debt, and will not be released by a discharge: *Meador* v. *Sharpe*, 14 B. R. 492; S. C., 54 Ga. 125; *Jones* v. *Russell*, 44 Id. 460; *Treadwell* v. *Holloway*, 12 B. R. 61; S. C., 46 Cal. 547. *Contra*, *Woolsey* v. *Cade*, 15 B. R. 238; S. C., 4 Cent. L. J. 202; *Owsley* v. *Cobin*, 15 B. R. 489. A conversion by an attorney of money belonging to his client is a debt created while acting in a fiduciary capacity: *Flanagan* v. *Pearson*, 14 Id. 37. The claim is provable but not discharged, and the claimant may sue on it after the question of discharge is determined: *Stokes* v. *Mason*, 12 Id. 498; S. C., 10 R. I. 261. A conditional vendor does not lose his claim for a conversion of the property by proving his debt, nor is such claim barred by a discharge: *Johnson* v. *Warden*, 13 B. R. 335; S. C., 47 Vt. 457. A judgment obtained in an action, the gravamen of which was fraud, is not released by a discharge: *Warner* v. *Cronkhite*, 13 B. R. 52; S. C., 6 Biss. 453, and cases cited. The word "debt" used in the bankrupt act is synonymous with claim: *Stokes* v. *Mason*, 12 B. R. 498; S. C., 10 R. I. 261.

shall be *prima facie* evidence in favor of such fact, and of the regularity of such discharge; provided, however, that any creditor of said debtor, whose debt was proved, or provable, against the estate in insolvency, who shall see fit to contest the validity of such discharge on the ground that it was fraudulently obtained, and who has discovered the facts constituting the fraud subsequent to the discharge, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same, or if the same shall have been pleaded, the effect thereof may be avoided collaterally upon any such ground.* *

(*a*) The mere fact that, in an action brought by a creditor against an insolvent who pleads his discharge, it is found that the insolvent did not surrender all his property to his assignee, is not sufficient to avoid the discharge. There must be an affirmative finding that the omission was fraudulent: *Tevis* v. *Hicks*, 41 Cal. 123.

The decree of discharge is the judgment in the case, and when the record shows the court had jurisdiction, it is free from collateral attack, except upon the ground of fraud in the procurement of the decree (*vide* section 32).

The discharge is a bar to judgments recovered upon debts existing at the time of filing the petition: *Imlay* v. *Carpentier*, 14 Cal. 173.

Unless a creditor, resident in a foreign state, voluntarily submits to the jurisdiction, or is represented by an attorney, appointed under section 35, the discharge is as to him *coram non judice: Hanscom* v. *Tower*, 17 Cal. 518. And the recitals in the decree have the same force and effect, and are as conclusive, as the recitals of an ordinary judgment. Decision on rehearing: *Langenour* v. *French*, 34 Cal. 98.

* U. S. R. S., Sec. 5119.—A discharge in bankruptcy duly granted shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to the bankrupt, setting a full copy of the same forth in its terms as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands. The certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge.

U. S. R. S., Sec. 5120.—Any creditor of a bankrupt, whose debt was proved or provable against the estate in bankruptcy, who desires to contest

SEC. 54. The refusal of a discharge to the debtor shall not affect the administration and distribution of his estate under the provisions of this act.

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the validity of the discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to annul the same. The application shall be in writing, and shall specify which, in particular, of the several acts mentioned in section 5110, it is intended to prove against the bankrupt, and set forth the grounds of avoidance; and no evidence shall be admitted as to any other of such acts; but the application shall be subject to amendment at the discretion of the court. The court shall cause reasonable notice of the application to be given to the bankrupt, and order him to appear and answer the same, within such time as to the court shall seem proper. If, upon the hearing of the parties, the court finds that the fraudulent acts, or any of them, set forth by the creditor against the bankrupt, are proved, and that the creditor had no knowledge of the same until after the granting of the discharge, judgment shall be given in favor of the creditor, and the discharge of the bankrupt shall be annulled. But if the court finds that the fraudulent acts and all of them so set forth are not proved, or that they were known to the creditor before the granting of the discharge, judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by the proceedings.

1. A debt is barred though omitted from the schedule, if with no fraudulent intention on the part of the bankrupt, and although the creditor has received no notice of the pendency of the proceedings: *Lamb* v. *Brown*, 12 B. R. 522; *Platt* v. *Parker*, 13 Id. 14; *Payne* v. *Able*, 4 Id. 220; *Stevens* v. *Bank*, 101 Mass. 109; *Thurman* v. *Andrews*, 13 B. R. 157. Or of the application for a discharge: *Lamb* v. *Brown*, *supra*; *Williams* v. *Butcher*, 12 Id. 143; *Pattison* v. *Wilbur*, 12 Id. 193; S. C., 10 R. I. 448; *Thurman* v. *Andrems*, *supra*. If the omission was fraudulent, the proper course is to have the discharge set aside: *Thurman* v. *Andrews*, *supra*; *Lamb* v. *Brown*, *supra*; *Humble* v. *Carson*, 6 B. R. 84.

2. The security on an appeal bond is discharged where the principal has been discharged in bankruptcy subsequent to the appeal: *Odell* v. *Wootten*, 4 B. R. 183; S. C., 38 Ga. 224. *Contra*, *Merritt* v. *Glidden*, 39 Cal. 559; *Knapp* v. *Anderson*, 15 B. R. 316. A promise to pay a debt made after adjudication need not be in writing, and the amount of the debt may be recovered: *Henley* v. *Lanier*, Id. 280; *Fraley* v. *Kelly*, 67 N. C. 78. Where a holder of an indorsed note consents to the discharge in bankruptcy of the maker, he discharges the indorser, although the claim against the indorser is merged in a judgment: *In re McDonald*, 14 B. R. 477.

3. This remedy is exclusive of any other mode of impeaching the valadity of a discharge, either in the federal or the state courts: *Black* v. *Blazo*, 13 B. R. 195; S. C., 117 Mass. 17; *May* v. *Howe*, 4 B. R. 677; S. C., 108 Mass. 502; *Burper* v. *Sparhawk*, 4 B. R. 685; S. C., 108 Mass. 111; *Smith* v. *Ramsey*, 27 Ohio St. Com. 339; *Ray* v. *Lapham*, 27 Ohio St. Com. 452; *Seymour* v. *Street*, 5 Neb. 85.

4. Suit must be brought within two years, even though the ground for setting aside the discharge did not become known for a long period after that time: *Pickett* v. *McGavick*, 14 B. R. 236; *Alton* v. *Robinett*, 9 Id. 74; *Way* v. *Howe*, *supra*. *Contra*, *Perkins* v. *Gay*, 3 B. R. 772.

5. To set aside a discharge, a creditor can not rely upon testimony known to him at the time the discharge was granted: *In re Marionneaux*, 13 B. R. 222.

ARTICLE VIII.

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SEC. 55. If any person, being insolvent, or in contemplation of insolvency, within one month before the filing of a petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiv-

(*a*) Sec. 3439, C. C. "Every transfer of property, or charge thereon, made, every obligation incurred, and every judicial proceeding taken with intent to delay or defraud any creditor, or other person of his demands, is void

ing such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment or seizure, having reasonable cause to believe that such person is insolvent, and that such attachment, seizure, payment, pledge, conveyance, transfer, or assignment is made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or

against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

Sec. 3440, Id. "Every transfer of personal property, other than a thing in action, or a ship or cargo at sea, or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or *respondentia*, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer."

Sec. 3441, Id. "A creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer or obligation."

Sec. 3442, Id. "In all cases arising under section 1227, or under the provisions of this title, except as otherwise provided in section 3440, the question of fraudulent intent is one of fact, and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration."

(*b*) An action founded upon a fraud can not be maintained by a party to the fraud: *Depuy* v. *Williams*, 26 Cal. 309.

A party who comes into court with a fraud upon his lips can not obtain relief: *Gregory* v. *Haworth*, 25 Id. 653.

If a creditor assigns and delivers to a debtor, to satisfy a debt due the later, a chose in action of greater value

in any way hinder, impede, or delay the operation of or to evade any of the provisions of this Act, such transfer, payment, conveyance, pledge, or assignment is void, and the assignee may recover the property,[b] or the value thereof, as assets of such insolvent debtor; and if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be *prima facie* evidence of fraud.[a] *

than the debt, and the assignment is made in good faith, and there is no fraud, the assignment vests in the assignee the right to receive for his own use the entire proceeds of the chose in action as against the creditors of the assignor: *Nathan* v. *King*, 51 Id. 521.

A deed made for the purpose of defrauding, hindering, or delaying creditors, is valid as against the grantor, and he can not be relieved against its operation, though it was in fact intended as a mortgage: *Ybarra* v. *Lorenzana*, 53 Id. 197.

For the purpose of impeaching a transfer of property on the ground of fraud, evidence of a fraudulent combination between the defendant and another to defraud others than the plaintiff in the same way is admissible: Pacific Coast Law Journal, vol. 4, 536.

(*c*) See notes to sections 49 and 56.

* U. S. R. S., Sec. 5128.—If any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures or suffers any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and [knowing] that such attachment [sequestration, seizure], payment, pledge, assignment, or conveyance is made in fraud of the provisions of this title, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited. And nothing in said section thirty-five shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith, upon a security taken in good faith on the occasion of the making of such loan.

U. S. R. S., Sec. 5129.—If any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and [knowing] that such payment, sale, as-

signment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this title, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this title, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt.

U. S. R. S., Sec. 5130.—The fact that such a payment, pledge, sale, assignment, transfer, conveyance, or other disposition of a debtor's property as is described in the two preceding sections, is not made in the usual and ordinary course of business of the debtor, shall be *prima facie* evidence of fraud.

1. The act intends to prevent all preferences by an insolvent person, and insure an equal distribution of his property to all his creditors. It was said in *In re Wynne*, 4 B. R. 23; *Potter et al.* v. *Coggeshall*, Id. 73, it is as much the policy of the bankrupt act to uphold liens and trusts when valid, as it is to set them aside when invalid.

2. This section does not render a sale *ipso facto* void. When the title under the sale is in issue it is incumbent upon the assignee to show a sale, and within the time limited; and also that the sale was unusual in its character and surroundings: *In re Hart*, 2 B. R. 538; *In re Beck*, 1 Id. 583.

3. A conveyance may be an act of bankruptcy in the grantor, although there is no fraudulent intent in accepting it by the grantee. An adjudication does not in itself affect the title of the purchaser: *In re Williams & Co.*, 3 B. R. 286.

4. The term insolvency is in this section used to denote the insufficiency of the interest and assets of an individual to pay his debts. In a restricted sense it means the inability of a person to pay his debts as they become due in the ordinary course of business. The act does not pretend to define every case of insolvency, or the evidence of insolvency, in every case that may arise. It does not mean an inability to pay one's debts at a future time; but it has been held in the United States courts that a trader may be said to be insolvent when he is not in a condition to pay his debts in the ordinary course of business, as persons carrying on trade usually do: *Sawyer* v. *Turpin*, 5 B. R. 339; *Merchants' National Bank of Hastings* v. *Truax*, 1 Id. 545; *In re Gray*, 2 Id. 358; *In re J. B. Wright*, Id. 490; *Wadsworth* v. *Tyler*, Id. 316; *Graham* v. *Stork*, 3 Id. 357; *Scammon* v. *Cole*, Id. 393; *Rison* v. *Knapp*, 4 Id. 349. It is not enough to show that there was danger of insolvency as a coming result: *Beals* v. *Quinn*, 101 Mass. 262.

5. So far as a case depends upon proof that the debtor was insolvent in fact at the time of giving a preference, it is not enough to show that there was danger of insolvency as a coming result: *Beals* v. *Quinn*, 101 Mass. 262.

6. Perhaps no precise rule can be laid down which will be applicable to all cases, inasmuch as the determination of each case rests largely upon its own peculiar facts. It is generally held by the bankrupt courts that a trader who is not able to pay all his debts in the usual and ordinary course of business, as persons carrying on trade usually do, is insolvent within the meaning of the bankrupt law, and there is no better general rule to govern courts when they are considering the facts of a case. It is neither too broad nor to narrow; while it would be quite too narrow and restricted to hold that failure to pay some one debt when due is evidence of insolvency in all cases under the act. Whether a single instance of non-payment of a debt at maturity would be evidence in a given case of insolvency depends somewhat upon the magnitude of the debt, the locality of the debtor, and what is the ordinary course of business and custom, in that respect, of the locality where the debtor resides, and upon such other facts and circumstances as will bear upon the question of insolvency. A different course would ignore the usage and course of business recognized between the debtor and creditor class in that particular locality, and would present the spectacle of the mercantile class saying the trader is solvent, and the courts saying he is insolvent; whereas the courts, upon such questions, should adopt the mercantile usage as the rule of decision. The question is, whether the debtor or trader is able to pay

his debts in the ordinary course, as persons carrying on trade there usually do. Hence it may be, and undoubtedly is, true that insolvency in commercial centers is not insolvency in small country towns. In the former places, if the debtor's paper is dishonored, his credit is gone, and he is *prima facie* insolvent; whereas, in the latter localities it is not so. Insolvency is a fact, and not a matter of definition or rule of law; and what is evidence of insolvency in London, or Paris, or New York, is not evidence of insolvency everywhere: *Driggs* v. *Moore, Foote & Co.*, 3 B. R. 602; 1 Abb. C. C. 440; *Wager* v. *Hall*, 5 B. R. 181; 3 Biss. 28; 16 Wall. 584.

7. Although there may be outstanding claims against a person which he has not the money in hand wherewith to pay, yet he can not be declared insolvent when, on the other hand, it does not appear that any of these were then due under the arrangements and understanding between him and his creditors, while it does appear that all the property and effects, in procuring which these debts have been contracted, and some five thousand dollars of his own earnings which had been expended, are still in his possession, uninjured and undecayed; that his health is as vigorous, his skill as unquestioned, his character as untarnished, his credit as good, his friends as numerous and zealous, and finally, the business enterprise in which he has just engaged as promising, *in prospectu*, as ever before: *Potter et al.* v. *Coggeshall*, 4 B. R. 73.

8. A merchant having no property but his stock in trade, who, when pressed for a debt admitted to be just, gives as a reason that he is unable to pay it, and suffers judgment to be rendered against him, is insolvent within any accepted or sound definition of that term, as used in the bankrupt act, although the stock in trade may, at cost price or cash value, could it be sold for what it is worth, equal or exceed the trader's liabilities: *Wilson* v. *City Bank*, 5 B. R. 270.

9. After the lapse of two months, preferences which the debtor may have made, are valid: *Potter* v. *Coggeshall*, 4 B. R. 73.

10. The words, "with a view to give a preference," have been held to mean an "intent" to give one creditor an advantage over others: *Foster* v. *Horne*, 102 Mass. 427. Every one is presumed to intend what is the necessary and unavoidable consequences of his acts: 8 Coke, 146; Bishop's Crim. Law, secs. 250, 251.

11. When a debtor is insolvent and knows it, a payment in full to a creditor is an intent to prefer: *Driggs* v. *Moore, Foote & Co.*, 3 B. R. 602; 1 Abb. C. C. 440; *Rison* v. *Knapp*, 1 Dillon, 186; *In re Gregg*, 4 B. R. 456.

12. Every man is presumed to know the law. His private intentions can not overcome the legal effects of his acts: *Traders' National Bank* v. *Campbell*, 3 B. R. 498.

13. If a debtor transfers a large portion of his property to one creditor without making provision for an equal distribution of its proceeds to all his creditors, it is conclusive evidence that a preference was intended, unless it is shown that the debtor at the time was ignorant of his insolvency, and that he had reasonable expectation of paying all his debts; in such case the burden of proof is upon him: *Toof* v. *Morton*, 6 B. R. 49.

14. A debtor can not set up his ignorance of his insolvency to defeat the operation of this section. He is chargeable with knowledge of his true condition: *Wager* v. *Hall*, 5 B. R. 181. Yet he may show that he was innocently mistaken as to his true condition: *In re S. P. Worner*, Id. 414; *Sedgwick* v. *Sheffield*, 6 Ben. 21.

15. To mortgage a trader's stock in trade is to put an end to farther credit in him, and the natural result is to give the mortgagee a preference: *Graham* v. *Stark*, 3 B. R. 357; *Scammon* v. *Cole*, Id. 393.

16. Giving a note and warrant to confess judgment is strong evidence of preference: *Hoghey* v. *Albin*, 2 B. R. 399; *In re Hafer & Bro.*, 1 Id. 586; *Traders' National Bank* v. *Campbell*, 3 Id. 498; *In re Terry & Cleaver*, 4 Id. 126.

17. A conveyance to secure an extension of indebtedness without intention to give a preference, is valid: *Booth* v. *Neely*, 12 B. R. 398; see, also, *Forbes* v. *How*, 104 Mass. 427.

18. Every act of the insolvent in dealing with his estate will be construed strictly against him: *Wager* v. *Hall*, 5 B. R. 181; *In re S. P. Warner*, Id. 414; *Jones* v. *Howland*, 49 Mass. 377; *Clark* v. *Iselin*, 9 B. R. 19.

19. The omission of a debtor to file a petition in insolvency, when sued for a just debt, is not sufficient evidence of a preference: *Wilson* v. *City Bank*, 5 B. R. 270.

20. The intent to prefer is the important thing. The payment may be made under great pressure on the part of the creditor, and still not be a preference: *Foster* v. *Hockley & Sons*, 2 B. R. 406; *Wilson* v. *Brinkham*, Id. 468; *In re Batchelder*, 3 Id. 150; *Giddings* v. *Dool*, 4 Id. 657; *Sawyer* v. *Turpin*, 5 Id. 399; *Taylor* v. *Whitthorn*, 5 Humph. 340; *Phœnix* v. *Ingraham*, 5 Johns. 412; *Wilkinson's Appeal*, 44 Penn. 284.

21. An agreement for a future security is not a conveyance, and its validity depends entirely upon the circumstances under which it was made: *Forbes* v. *Howe*, 102 Mass. 427; *Second National Bank* v. *Hart*, 4 B. R. 616; *Sawyer* v. *Turpin*, 5 Id. 339; *Graham* v. *Stark*, 3 Id. 357; *Harvey* v. *Crane*, 5 Id. 218; *contra*, *In re Wood*, Id. 421; *In re McKay & Aldus*, 7 Id. 230.

22. If in pursuance of an agreement made long before an insolvent mortgages his estate immediately previous to proceedings in insolvency, it is not a preference: *Burdick* v. *Jackson*, 15 B. R. 318.

23. A conveyance of land in pursuance of a previous agreement, when actual possession has been given under the agreement, is valid, even if the consideration was paid just prior to the transfer, and within the two months: *Post* v. *Corbin*, 5 B. R. 11.

24. The rules of a stock board provide that a member failing to keep his contracts with other members for six months, his seat shall be sold, and the claims of his creditors in the Board shall be paid with the proceeds, it was held that an assignment of his seat before the expiration of the six months, for the purpose of making such payment, is not a preference: *Hyde* v. *Woods*, 10 B. R. 54.

25. Exchanging one set of securities for another is not a fraud, unless the new securities are more valuable than the old: *Bernhsiel* v. *Ferman*, 11 B. R. 505.

26. A mortgage upon exempt property is not a preference: *Rix* v. *Capital Bank*, 2 Dillon, 367.

27. A conditional sale or delivery of goods is not a preference; provided the whole transaction is free from actual fraud: *Sawyer* v. *Turpin*, 5 B. R. 339.

28. Legal advice given to a debtor that he would be criminally liable unless a certain debt is paid, does not make the payment valid: *Strain* v. *Gourdin*, 11 B. R. 156.

29. The word "conveyance" in the act has been held to mean to mean any transfer of property whatever. It includes mortgages: *Bingham* v. *Frost*, 6 B. R. 130.

30. It has been held that the declarations of the bankrupt regarding a transfer are evidence of intention if a conspiracy is established, notwithstanding the creditor was not present, or had knowledge thereof: *Nudd* v. *Burrows*, 13 B. R. 289.

31. Allowing a creditor to take judgment by default if there is no defense to the action is not of itself sufficient evidence of fraud: *Wilson* v. *City Bank*, 5 B. R. 270; *Catlin* v. *Hoffman*, 9 Id. 342; and there are many other cases to the same effect.

32. If the debtor does anything before suit which will secure the creditor a judgment with the knowledge of the creditor, with intent to prefer, will be evidence of fraud: *Little* v. *Alexander*, 12 B. R. 134.

33. Where the preference is obtained by a judgment and execution there must be guilty collusion to constitute a fraudulent preference: *Clark* v. *Iselin*, 9 B. R. 19; see, also, *Wilkinson's appeal*, 4 Penn. 284.

34. A lien upon real property by judgment has the same effect as a mortgage: *Catlin* v. *Hoffman*, 9 B. R. 342.

35. Section eight does not require the party receiving the transfer shall know. He shall have reasonable cause to believe. If the facts within his knowledge would induce belief in the mind of a reasonable, capable business man, it is sufficient: *Foster* v. *Hockley & Sons*, 2 B. R. 406; *Otis* v. *Hadley*, 112 Mass. 100.

36. It should be observed that the creditor must have had reasonable cause to believe when the transfer was made: *In re Hart*, 2 B. R. 539.

37. "Reasonable cause to believe" means such a state of facts or circum-

stances which would cause an ordinarily prudent man to inquire into the facts: *In re J. B. Wright*, 2 B. R. 490; *Merchants' National Bank* v. *Truax*, 1 Id. 545.

38. It is only necessary that the creditor have reasonable cause to believe that a preference is intended. He may not have any belief on the subject, and if a state of facts is brought to his notice which would lead a prudent business man to believe that the debtor can not meet his engagements in the ordinary course of business, proceedings may be had under this section: *Buchanan* v. *Smith*, 4 B. R. 397; *Burpee* v. *National Bank*, 9 Id. 314; *Scammon* v. *Cole*, 5 Id. 257.

39. The question of "reasonable cause to believe" is a question of fact: *Foster* v. *Howe*, 102 Mass. 427.

40. Evidence that it was the general custom and within the ordinary course of business to make sales like the one in question is competent: *Otis* v. *Hadley*, 112 Mass. 100.

41. A payment made in the ordinary course of business without reasonable cause to believe the debtor to be insolvent is valid: *Coxe* v. *Hale*, 8 B. R. 562; *Clark* v. *Iselin*, 9 Id. 19.

42. If property is transferred outside of the usual course of trade it will be considered fraudulent, unless such transfer is according to the usual custom of dealing between the parties: *Rison* v. *Knapp*, 4 B. R. 349.

43. A creditor can not, by closing his eyes when the statutory evidence of fraud is placed before him, escape the consequences of his acts: *Graham* v. *Stork*, 3 B. R. 357.

44. Not paying debts when due from a lack of present means, and inability to raise means, is *prima facie* evidence of insolvency: *Driggs* v. *Moore, Foote & Co.*, 3 B. R. 602.

45. Courts will not interfere in the ordinary transactions between men, unless it is evident that the creditor knew or had reason to believe that he was getting what ought to belong to creditors generally. Property so obtained must be surrendered to the assignee: *Traders' National Bank* v. *Campbell*, 3 B. R. 498.

46. The small amount of business transacted can not affect the transfer. The amount paid fraudulently may have been small, yet the payment is fraudulent if within the words of the statute. *McAllister* v. *Richards*, 6 Penn. 133.

47. It is not in the ordinary course of business to take a debtor's property on legal process. If, after repeated demands, the debtor does not pay, and the creditor sues to collect his claim, he has reasonable cause to believe the debtor to be insolvent: *Buchanan* v. *Smith*, 4 B. R. 397.

48. A transfer of all the debtor's property is not in the usual and ordinary course of business: *Grow* v. *Ballard*, 2 B. R. 254; *Cookingham* v. *Morgan*, 5 Id. 16. But if the creditor has no knowledge that there are any other creditors, the transfer is valid: *Wadsworth* v. *Tyler*, 2 Id. 316. It will also stand if no facts are brought to the creditor's attention which would reasonably have induced him to believe the debtor to be insolvent: *Roskin* v. *Third National Bank*, 14. Id. 4.

49. It is not in the usual course of a retail merchant's business to sell all his stock to one person, especially if the goods are carried away and the business discontinued. Nor to assign over his entire stock to a judgment-creditor: *Pierce* v. *Evans*, 61 Penn. 415; *Mayer* v. *Hermann*, 10 Blatch. 256.

50. The principal is chargeable with his agent's knowledge of the whole transaction: *Graham* v. *Stark*, 3 B. R. 357; *In re E. Meyer*, 2 Id. 422. But *In re J. B. Wright*, Id. 490, the contrary was held. See also *Hooven* v. *Wise*, 14 Id. 264, where it is held that a merchant placing his claim in the hands of an agent for collection is not chargeable with a sub-agent's knowledge, unless he has authorized the employment of the sub-agent.

51. Even if the creditor has paid a valuable consideration, or has advanced money, it will not validate the transaction, if he had reasonable cause to believe the debtor insolvent at the time of its execution: *North* v. *House*, 6 B. R. 365.

52. There is great difference between knowing and having reasonable cause to believe: *Singer* v. *Sloan*, 11 B. R. 433; *Webb* v. *Sachs*, 15 Id. 168.

53. A purchaser from a preferred creditor will not be protected unless he is a *bona fide* purchaser without notice and for value. He is not a *bona fide* purchaser if he has knowledge of facts sufficient to put a man of ordinary care upon inquiry: *Rison* v. *Knapp*, 4 B. R. 349.

54. In proceedings by the assignee to recover of the preferred creditor, the value of the property is the measure of damages, and not the amount realized by a sale under an execution: *Clarion Bank* v. *Jones*, 11 B. R. 381.

55. The creditor is liable for interest from the time of the receipt of the money paid to him in violation of the act: *Traders' National Bank* v. *Campbell*, 3 B. R. 498.

56. When the transfer is of articles or property exempt from execution it can not be disturbed: *Grow* v. *Ballard*, 2 B. R. 254.

ARTICLE IX.

PENAL CLAUSES.

SECTION
56. Offenses against the act; Punishment for fraud on the part of insolvent debtors.
NOTE *a*.—Fraudulent removal or sale of property, punishment for.
b.—Offering false books and instruments, punishment for; Innocence presumed; Duty of jury in criminal cases; Charging the offense in indictments; Instructions to jury.
NOTE 1.—U. S. Law: Indictments must conform to the general law.
2.—Indictments, what facts to appear in.
3.—Object of the statute.
4.—Frauds must be against all creditors.
5.—Fraudulent mortgage.
6.—Limitation as to time of commission of fraud.

SEC. 56. From and after the taking effect of this act, if any debtor or insolvent shall, after the commencement of proceedings in insolvency, secrete or conceal[a] any property belonging to his estate, or part with, conceal or destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified,[b] any book, deed, document, or writing relating thereto, or remove or cause to be removed the same or any part thereof, with intent to prevent it from coming into the possession of the assignee in insolvency, or to hinder, impede, or delay his assignee

(*a*) Sec. 154, Penal Code. "Every debtor who fraudulently removes his property or effects out of this state, or fraudulently sells, conveys, assigns, or conceals his property, with intent to defraud, hinder, or delay his creditors of their rights, claims, or demands, is punishable by imprisonment in the county jail, not exceeding one year, or by fine not exceeding five thousand dollars, or by both."

(*b*) Sec. 132, Penal Code. "Every person who upon any trial, proceeding, or inquiry, or investigation, whatever, authorized or permitted by law, offers in evidence, as genuine or true, any book, paper, document, record, or other instrument in writing, knowing the same to have been forged or fraudulently altered or antedated, is guilty of a felony." See also secs. 133, 134, 135, Id.

It will be presumed that the insolvent debtor is innocent of crime or wrong. That he intended the ordinary consequences of his own act. That his private transactions have been fair and regular. That the ordinary course of business has been followed: Code C. P., sec. 1963.

The jury is not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, against a less number, or

in recovering or receiving the same, or make any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate, with like intent, or shall spend any part thereof in gaming; or shall, with intent to defraud, willfully and fraudulently conceal from his assignee, or fraudulently or designedly omit from his schedule, any property or effects whatsoever; or if, in case of any person having to his knowledge or belief proved a false or fictitious debt against his estate, he shall fail to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or shall attempt to account for any of his property by fictitious losses or expenses; or shall, within three months before the commencement of proceedings in insolvency, under the false pretense of carrying on business and dealing in the ordinary course of trade, obtain on credit from any person any goods or chattels, with intent to defraud; or shall, with intent to defraud his creditors, within three months next before the commencement of proceedings in insolvency, pawn, pledge, or dispose of otherwise than by *bona fide* transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for, he shall be

against a presumption or other evidence satisfying their minds: Id. 2061.

In charging the offense, it is unnecessary to follow strictly the language of the statute by which it is defined: *People* v. *Potter*, 35 Cal. 110.

In those cases in which it requires the concurrence of several acts, or the doing of the act under particular circumstances, to constitute an offense, the indictment or information should state the necessary acts and circumstances: *People* v. *Murphy*, 39 Id. 52.

It is error to instruct a jury, in a civil case of imputed fraud, that if they have a doubt of the guilt of the party charged, they must find in his favor. Issues of fact in civil cases are determined by a preponderance of testimony, and this rule applies as well to cases of fraud as to any other: *Ford* v. *Chambers*, 19 Id. 143.

The rule applicable to criminal cases, where the jury have doubt of the guilt of the accused, is inadmissible in civil cases: Id.

It was error to instruct the jury that fraud could not be

deemed guilty of misdemeanor, and, upon conviction thereof, shall be punished by imprisonment in the County Jail for not less than three months nor more than two years.[c] *

presumed, but may be established by circumstances, but not of a light character; the circumstances must be of a most conclusive nature: Id.

(c) See notes to secs. 49 and 55.

* U. S. R. S., Sec. 5132.—Every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or upon that of a creditor: 1. Who secretes or conceals any property belonging to his estate; or, 2. Who parts with, conceals, destroys, alters, mutilates, or falsifies, or causes to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto; or, 3. Who removes or causes to be removed any such property or book, deed, document, or writing out of the district, or otherwise disposes of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay him in recovering or receiving the same; or, 4. Who makes any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate with the like intent; or, 5. Who spends any property belonging to his estate in gaming; or, 6. Who, with intent to defraud, willfully and fraudulently conceals from his assignee or omits from his inventory any property or effects required by this title to be described therein; or, 7. Who, having reason to suspect that any other person has proved a false or fictitious debt against his estate, fails to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or, 8. Who attempts to account for any of his property by fictitious losses or expenses; or, 9. Who within three months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud; or, 10. Who, within three months next before the commencement of proceedings in bankruptcy, with intent to defraud his creditors, pawns, pledges, or disposes of, otherwise than by transactions made in good faith in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit, and remain unpaid for; shall be punishable by imprisonment, with or without hard labor, for not more than three years.

1. The indictment or information for any of the offenses contained in section fifty-six must conform to the general law and practice in criminal proceedings. An indictment or information should set forth the facts and circumstances of the alleged offense, so that the accused may be prepared for his defense: *People* v. *Hood*, 6 Cal. 236. They should contain every averment that is substantially necessary for the information of the defendant. If the language of the statute is used it will be sufficient: *People* v. *Dolan*, 9 Id. 576; *People* v. *Coonan*, 34 Id. 191; *People* v. *Rodriguez*, 10 Id. 50; *People* v. *Thompson*, 4 Id. 238; *People* v. *White*, 34 Id. 183.

2. It must appear that the petitioning creditor had a right to commence and prosecute proceedings. The amount of the debt must appear. It must appear that the bankrupt obtained goods within three months of the bankruptcy, by means of representations, which he knew to be false, that he was carrying on business, and such representation must actually be made by him. The description of goods obtained should state what they were, instead of "a large quantity." The description of goods should be as definite as in a declaration of trover: *U. S.* v. *Prescott et al.*, 4 B. R. 112.

3. The obvious purpose of the statute is to prevent persons from obtaining goods on credit, with the expectation on the part of those who give the credit that they will be disposed of in the ordinary course of business, when, in fact, the purchaser intends to dispose of such goods in some extraordinary or unusual manner, or knows that he is insolvent, and that the goods will go into the hands of his assignee in bankruptcy, and be disposed of for the benefit of his creditors generally, and not in the usual course of trade. It was to prevent men from abusing their credit, and imposing by means of it upon others, that the act was passed; to compel, so far as the law will do it, the observance of good faith in commercial transactions between business men. A man's intentions can only be ascertained from his acts. From the circumstances surrounding the whole transaction, the jury are to infer what was the probable purpose and intent of the defendant at the time he obtained the goods. The short time that elapsed between the purchase and the unusual transfer of the goods, the false and conflicting statements made by him in regard to his financial condition, and the subterfuges and acts resorted to by him to keep his creditors quiet, are circumstances to be considered as tending to show a fraudulent intent. The criminal intent is not to be presumed without evidence. The law presumes every one innocent until proven guilty, and the defendant is entitled to the benefit of every reasonable doubt: *United States* v. *Frank*, 3 B. R. quarto, 175; S. C., 2 Biss. 263; *U. S.* v. *Geary*, 4 B. R. 534; *U. S.* v. *Thomas*, 7 Id. 188; *U. S.* v. *Penn.* 13 Id. 464.

4. The scope of the act is to punish frauds on the creditors generally, and not on the particular creditor who sold the goods, and an indictment which charges a fraud on one creditor only can not be sustained. If the goods were obtained upon credit with the intent of disposing of them to raise money, the fraud on the seller would be the most obvious one; but the object of the statute seems to be to punish fraud on the creditors generally, and it does not refer the intent to the time of the disposing of the goods out of the usual course of trade, and at that time the fraud would not be of one creditor more than of the rest: *U. S.* v. *Clark*, 4 B. R. 59; *U. S.* v. *Penn.* 13 Id. 464.

5. The making of a fraudulent chattel-mortgage renders a party liable under this provision: *U. S.* v. *Bayer*, 13 B. R. 88.

6. It is not necessary that the goods which have been fraudulently disposed of shall have been obtained within three months before the commencement of the proceedings in bankruptcy: *U. S.* v. *Smith*, 13 B. R. 61.

ARTICLE X.

MISCELLANEOUS.

SECTION
57. Death of insolvent does not abate proceedings.
NOTE 1.—U. S. Law; "Proceedings," meaning of word.
2.—Death of bankrupt after order to show cause; Effect of.
58. Statute of limitations, when not to run.
59. Representation by attorney.
NOTE 1.—U. S. Law; Attorney in fact may act.
2.—One member of firm may give power of attorney.
3.—Joint power, how executed.
4.—Power need not be acknowledged.
60. Exemptions for benefit of insolvent; Homestead to be set apart.
NOTE a.—Provisions of C. C. P. applicable to homesteads.
61. Commencement of proceedings; What is deemed to be.
62. Construction of words used in act.
NOTE 1.—U. S. Law; Construction of the word "person."
63. Receiver may be appointed, when.
NOTE 1.—U. S. Law; Receiver may expend money of estate, when.
2.—May prosecute actions.
64. Application of parts of Code of Civil Procedure.
65. Proceedings when property has been attached; Costs to be allowed; When a preferred claim.
66. Petition may be dismissed by order of court.
67. Appeals to the supreme court.
68. Repeal of conflicting acts.

SEC. 57. If any debtor shall die after the order of adjudication, the proceedings shall be continued and concluded in like manner and with like validity and effect as if he had lived.[a] *

SEC. 58. Pending proceedings by or against any person, copartner, or corporation, no statute of limitations of this State shall run against a claim which in its nature is provable against the estate of the debtor.

SEC. 59. Any creditor, at any stage in the proceedings, may be represented by his attorney or duly authorized agent.†

(*a*) Sec. 385, C. C. P.

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* U. S. R. S., Sec. 5090.—If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

1. The word "proceedings" does not include a discharge, unless there is a compliance with the requirements of section 5113 in regard to the application for the discharge and the oath. No discharge can be granted where the debtor dies before these requirements are complied with: *In re O'Farrell*, 2 B. R. 484; *In rè Quinike*, 4 Id. 92.

2. If the debtor, in a case of involuntary bankruptcy, dies after the issuing of the order to show cause, and before trial, the proceedings abate: *In re John V. McDonald*, 8 B. R. 237. After the actual issuing of the warrant they do not abate. The warrant is required to issue forthwith: *In re E. C. Litchfield*, 9 Id. 506.

† U. S. R. S., Sec. 5095.—Any creditor may act at all meetings by his duly constituted attorney the same as though personally present.

1. In order to vote for assignee, the attorney must be an attorney in fact,

SEC. 60. It shall be the duty of the Court having jurisdiction of the proceedings, to exempt and set apart for the use and benefit of said insolvent such real and personal property as is by law exempt from execution; and also a homestead in the manner as provided in section one thousand four hundred and sixty-five of the Code of Civil Procedure.[a]

(a) Sec. 1465, C. C. P. "Upon the return of the inventory, or at any subsequent time during the administration, the court may, on its own motion, or on petition therefor, set apart for the use of the surviving husband or wife, or, in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead, selected, designated, and recorded; *provided*, such property was selected from the common property, or from the separate property, of the persons selecting or joining in the selection of the same. If none has been selected, designated and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate, and set apart, and cause to be recorded, a homestead, for the use of the surviving husband or wife, and the minor children; or if there be no surviving husband or wife, then for the use of the minor children in the manner provided in article two of this chapter, out of the common property; or if there be no common property, then out of the real estate belonging to the decedent."

The following are the provisions of article two:

Sec. 1474. "If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in

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and must be appointed by a power of attorney: *In re Purvis*, 1 B. R. 163.

2. One member of a firm may execute the power: *In re J. Barrett*, 2 B. R. 533.

3. If the power is joint, it must be exercised by all to whom it is given: *In re Phelps, Caldwell & Co.*, 1 B. R. 525. A power to a firm must be exercised by all the partners together: *In re Frank*, 5 Id. 194.

4. They need not be acknowledged: *In re Powell*, 2 B. R. 45; *In re Barnes*, 1 Lowell, 560. It would seem that under the general orders in bankruptcy they must be. They may be acknowledged before a notary public: *In re Butterfield*, 14 B. R. 195; *Contra, in re Christley*, 10 Id. 268. A good power of attorney must be shown: *In re Hill*, 1 Ben. 321; *In re Knœpfel*, Id. 330.

the survivor. If the homestead was selected from the separate property of either the husband or the wife, without his or her consent, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the superior court to assign it for a limited period to the family of the decedent. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except as provided in the Civil Code."

Sec. 1475. "If the homestead selected and recorded prior to the death of the decedent be returned in the inventory, appraised at not exceeding five thousand dollars in value, or was previously appraised, as provided in the Civil Code, and such appraised value did not exceed that sum, the Superior Court must, by order, set it off to the persons in whom title is vested by the preceding section. If there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate. If the funds of the estate be adequate to pay all claims against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionately with other claims allowed, and the liens or incumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment."

Sec. 1476. "If the homestead, as selected and recorded, be returned in the inventory appraised at more than five thousand dollars, the appraisers must, before they make their return, ascertain and appraise the value of the homestead at the time the same was selected; and if such value exceeded five thousand dollars, or if the homestead was appraised as provided in the Civil Code, and such appraised value exceeded that sum, the appraisers must determine whether the premises can be divided without material injury, and if they find that they can be thus divided, they must admeasure and set apart to the parties entitled thereto such portion of the premises, including the dwelling-house, as will amount in value to the sum of five thousand dollars, and make report thereof, giving the metes, bounds, and full description of the portion set apart as a homestead. If the appraisers find that the premises exceeded in value, at the time of their selection, the sum of five

SEC. 61. The filing of the petition by or against a debtor upon which an order of adjudication in insolvency may be made by the Court, shall be deemed to be the commencement of proceedings in insolvency under this Act.

SEC. 62. Words used in this Act in the singular, include

thousand dollars, and that they can not be divided without material injury, they must report such finding, and thereafter the court may make an order for the sale of the premises and the distribution of the proceeds to the parties entitled thereto."

Sec. 1477. "Any two of the appraisers concurring may discharge the duties imposed upon the three, and make the report. A dissenting report may be made by the third appraiser. The report must state fully the acts of the appraisers. Both reports may be heard and considered by the court in determining a confirmation or rejection of the majority report, but the minority report must in no case be confirmed."

Sec. 1478. "When the report of the appraisers is filed, the court must set a day for hearing any objections thereto, from any one interested in the estate. Notice of the hearing must be given for such time and in such manner as the court may direct. If the court be satisfied that the report is correct, it must be confirmed, otherwise rejected. In case the report is rejected, the court may appoint new appraisers to examine and report upon the homestead, and similar proceedings may be had for the confirmation or rejection of their report as upon the first report."

Secs. 1479, 1480, 1481, 1482, 1483, and 1484 are repealed.

Sec. 1485. "The costs of all proceedings in the Superior Court, provided for in this chapter, must be paid by the estate, as expenses of administration. Persons succeeding by purchase or otherwise to the interests, rights, and title of successors to homesteads, or to the right to have homesteads set apart to them, as in this chapter provided, have all the rights and benefits conferred by law on the persons whose interests and rights they acquire."

Sec. 1486. "A certified copy of every final order made in pursuance of this article by which a report is confirmed, property assigned, or sale confirmed, must be recorded in the office of the recorder of the county where the homestead property is situated."

the plural, and in the plural, the singular, and the word "debtor" includes partnerships and corporations.* *

SEC. 63. A receiver may be appointed by the Court in which an insolvent proceeding is pending before the election of an assignee:

1. Upon the application of creditors where it is shown that the property, or any portion thereof, is in danger of being lost, removed, or materially injured;

2. In all other cases where receivers are appointed, by the usage of Courts of Equity. And thereupon the appointment, oath, undertaking, and powers of such receiver shall, in all respects, be regulated by the general laws of the State applicable to receivers.* †

(*a*) Sec. 17, C. C. P.; Sec. 14, C. C.; Sec. 17, Political Code; Sec. 19, Penal Code.

(*a*) See C. C. P., secs. 564–9.

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* U. S. R. S., Sec. 5013.—In this title the word "assignee," and the word "creditor," shall include the plural also; and the word "messenger" shall include his assistant or assistants, except in the provision for the fees of that officer. The word "marshal" shall include the marshal's deputies; the word "person" shall also include "corporation;" and the word "oath" shall include "affirmation." And in all cases in which any particular number of days is prescribed by this title, or shall be mentioned in any rule or order of court, or general order which shall at any time be made under this title, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall fall on Sunday, Christmas day, or any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time shall be reckoned exclusive of that day also.

1. This section is not to be construed as applying the word "person" to include any other corporations as subject to the provisions of the act than those described in section 5122: *Adams* v. *R. R. Co.*, 4 B. R. 314; *Sweatt* v. *Boston R. R. Co.*, 5 Id. 234.

† ACT 1874, ch. 390, sec. 1; 18 Stat. 178.—That the court may, in its discretion, on sufficient cause shown, and upon notice and hearing, direct the receiver or assignee to take possession of the property, and carry on the business of the debtor, or any part thereof, under the direction of the court, when, in its judgment, the interest of the estate as well as of the creditors will be promoted thereby, but not for a period exceeding nine months from the time the debtor shall have been declared a bankrupt: *Provided*, that such order shall not be made until the court shall be satisfied that it is approved by a majority in value of the creditors.

1. The court may authorize the assignee to spend money to put property into a salable condition. The assignee should endeavor to settle and liquidate the estate as rapidly as possible and to the best advantage. It is no part of his ordinary right or duty to carry on a trade, but if in a reasonable time and at a reasonable expense, he can make property salable which is not so in the condition in which he finds it, he may do so. He will not be allowed to do so, however, unless it is clearly shown that he can make such a

SEC. 64. All sections of the Code of Civil Procedure of the State of California relating to contempts are hereby made applicable to all proceedings under this Act.[a] An appeal shall be allowed to the Supreme Court from any order adjudging any person guilty of contempt of court.[b]

SEC. 65. When an attachment has been made and is not dissolved before the commencement of proceedings in insolvency, or is dissolved by an undertaking given by the defendant, if the claim upon which the attachment suit was commenced is proved against the estate of the debtor, the plaintiff may prove the legal costs and disbursements of the suit, and of the keeping of the property, and the amount thereof shall be a preferred debt. In all contested matters in insolvency, the court may, in its discretion, award costs to either party, to be paid by the other, or to either or both parties, to be paid out of the estate, as justice and equity may require; in awarding costs, the court may issue execution therefor. In all involuntary cases under this act, the court shall allow the petitioning creditors out of the estate of the debtor, if any adjudication of insolvency be made as a preferred claim, all legal costs and disbursements incurred by them in that behalf.

SEC. 66. The court may, upon the application of the debtor, if it be a voluntary petition, or of the petitioning creditors, if a creditor's petition, dismiss the petition and discontinue the proceedings at any time before the appointment of assignee; after the appointment of assignee, no dismissal shall be made without the consent of all parties interested in or affected thereby.

SEC. 67. An appeal may be taken to the Supreme Court in the following cases:[a]

(*a*) C. C. P., Secs. 178, 183, 907, 908, 909, 910, 1016, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1460, 1461.

(*b*) Sec. 67.

(*a*) Sec. 64.

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bargain for the necessary work as will almost to a moral certainty insure the creditors against loss, and insure them a large gain within a reasonable time: *Foster* v. *Ames*, 2 B. R. 455.

2. If a receiver institutes a suit to recover the value of property sold by the bankrupt in fraud of the bankrupt law prior to the commencement of proceedings in bankruptcy, the assignee will not be permitted to prosecute the suit: *Lansing* v. *Morton*, 4 B. R. 127. A receiver can not prosecute such an action: Id.

1. From an order granting or refusing an adjudication of insolvency;

2. Allowing or rejecting a creditor's claim, in whole or in part;

3. Overruling a motion for a new trial;

4. Settling an account of an assignee;

5. Against or in favor of setting apart homestead or other property claimed as exempt from execution;

6. Granting or refusing a discharge to the debtor.

The notice, undertaking, and procedure on appeal shall conform to the general laws of this State regulating appeals in civil cases, except that when the assignee has given an official undertaking and appeal from a judgment or order in insolvency, his official undertaking stands in the place of an undertaking on appeal, and the sureties therein are liable on such undertaking.*

SEC. 68. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed; *provided, however*, that such repeal shall in no manner invalidate or affect any case in insolvency instituted and pending in any Court prior to the day when this Act shall take effect.†

* U. S. R. S., Sec. 4980.—Appeals may be taken from the district to the circuit courts in all cases in equity, and writs of error from the circuit courts to the district courts may be allowed in cases at law, arising under or authorized by this title, when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the district court to the circuit court for the same district.

† 5132*a*. ACT OF 1874—GENERAL REPEALING CLAUSE.—That all acts and parts of acts inconsistent with the provisions of this act, be, and the same are hereby repealed.

APPENDIX.

FORMS UNDER INSOLVENCY LAWS OF CALIFORNIA.

No. 1200.

BLANK PUBLISHED.*

Petition by Debtor.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Brown*, An Insolvent Debtor. } Petition by Debtor.

To the Honorable the Superior Court of the *City and* County of *San Francisco*, State of California:

The Petition of *John Brown* respectfully shows: That your Petitioner is, and for more than six months next preceding the filing of this Petition has been, a resident of the *City and* County of *San Francisco*, State of California; that he has since the *sixteenth* day of *June*, 1880, been engaged in the business of *keeping a retail grocery* at the *City and* County of *San Francisco*; that in consequence of *bad debts due him and the loss of custom following the passage by the Legislature of the State of California, of the Act known as the Pedro Bill*, your Petitioner has become, and is, insolvent, and utterly unable to pay his debts in full, and is an Insolvent Debtor within the true intent and meaning of the Act of the Legislature of California, entitled "An Act for the Relief of Insolvent Debtors, for the Protection of Creditors, and for the Punishment of Fraudulent Debtors," approved April 16, 1880, and being desirous of having the estate, property, and effects of your Petitioner applied to the payment of his debts and liabilities, proportionally, and without preference to any, he, for that purpose, is willing to and does surrender all his estate and effects for the benefit of his Creditors, in pursuance of the provisions of said Act; and your Petitioner, the Insolvent, declares that it is his desire to

*The Schedules are published separately from the Petition, and are on sale by the publishers. Also, Schedules to Creditor's Petition.

be discharged from all his debts and liabilities, and that he has truly described them all in the Schedules hereto annexed, according to the best of his knowledge and belief.

The Schedule annexed, marked "A," contains a summary statement of the affairs of your Petitioner.

The Schedule hereto annexed, marked "B," contains the names and place of residence of his Creditors, as near as he can now state them, and the sum due to each Creditor, the true nature of the indebtedness or demand, and the true cause and consideration thereof, and the time and place when and where said indebtedness accrued, and a statement of any existing pledge, lien, mortgage, judgment, or other security, for the payment of the same.

The Schedule hereto annexed, marked "C," contains an accurate description of all the estate, both real and personal, of your Petitioner, including his *homestead*, and all property exempt by law from execution, the place where situated, and a statement of all incumbrances thereon.

Wherefore your Petitioner prays to make a cession of his estate, and to be discharged from all claims, debts, liabilities, and demands set forth in the Schedule hereto annexed, or which may be proved against his estate in insolvency, in pursuance of the provisions of said Act.

Dated this *first* day of *December*, 1880.

John Brown, Petitioner.

Geo. W. Tyler, Attorney for Petitioner.

OATH TO PETITION.

I, *John Brown*, do solemnly swear, that the Schedule, Petition, and Inventory now delivered by me, contain a full, perfect, and true discovery of all the estate, real, personal, and mixed, goods and effects, to me in any way belonging; all such debts as are to me owing, or to any person or persons in trust for me, and all securities and contracts, and contracts whereby any money may hereafter become payable, or any benefit or advantage accrue to me or to my use, or to any other person or persons in trust for me; that I have no lands, money, stock, or estate, reversion, or expectancy, besides that set forth in my Schedule and Inventory; that I have, in no instance, created or acknowledged a debt for a greater sum than I honestly and truly owe; that I have not, directly or indirectly, sold, or otherwise disposed of, or concealed any part of my property, effects, or contracts; that I have not in any way compounded with my creditors, whereby to secure the same, or to receive, or to expect, any profit or advantage therefrom, or to defraud or deceive any creditor to whom I am indebted, in any manner. So help me God.

John Brown.

Sworn and subscribed before me, this *first* day of *December*, 1880.
L. S. *Fred. P. Stone, Notary Public.*

SCHEDULE A.

The following is a Summary Statement of Petitioner's affairs, with the estimated value of all his property and the amount of all incumbrances:

			DOLLARS.	C.
Capital *on the sixteenth day of June*, 1880, *cash*			10,000	00
	DOLLARS.	C.		
Value of Real Estate per Schedule "C," annexed hereto.....	5,000	00		
Value of Merchandise on hand per Schedule "C," annexed hereto.....	1,000	00		
Value of all other personal property, as per Schedule "C".....				
Amount of Debts due to Petitioner, as per Schedule "C," annexed hereto..	3,000	00		
Value of Homestead, as per Schedule "C".....				
Value of all other Property exempt from Execution as per Schedule "C".....	1,000	00		
Amount of Incumbrances on Real Estate, as per Schedule "C".....				
Amount of Incumbrances on Homestead, as per Schedule "C".....				
Amount of Incumbrances on all other Personal Property exempt from Execution, as per Schedule "C".....				
Amount of Incumbrances on other Personal Property, as per Schedule "C"				
	10,000	00	10,000	00

John Brown, Petitioner.

SCHEDULE B.

Referred to in the annexed Petition, forming a part thereof, containing the names and places of residence of his creditors and the sum due to each, the true nature of the indebtedness or demand, the true cause and consideration thereof, and the time and place when and where said indebtedness accrued, and a statement of any existing pledge, lien, mortgage, judgment, or other security for the payment of the same.

Names of Creditors.	Residence of Creditors.	Sum Due.	Nature of Indebtedness or Demand.	True Cause and Consideration for Indebtedness.	Time when Indebtedness Accrued.	Place where Indebtedness Accrued.	Statement of any existing Pledge, Lien, Mortgage, Judgment or Other Security for the Payment of the said Debt.
Henry Brickwedel	*City of San Francisco*	*3000 00*	*Book Acct.*	*Liquors and Groceries*	*June 16, 1880*	*City of San Francisco*	*No security.*

John Brown, Petitioner.

SCHEDULE C.

Referred to in the annexed Petition, forming part thereof, containing an accurate description of all the estate, both real and personal, of the petitioner, including his homestead, if any, and all property exempt by law from execution, and where the same is situated, and all incumbrances thereon.

Real Estate belonging to Petitioner, and incumbrances thereon.	Homestead of Petitioner, and incumbrances thereon.	Property of Petitioner exempt by law from execution and where situated, and incumbrances thereon.	All other Personal Property of Petitioner, where situated, and all incumbrances thereon.
Lot on the S. W. corner of Kearny and Washington streets, in the City and County of San Francisco, being twenty-five feet front on Kearny street, with a uniform depth of one hundred feet on Washington street, with dwelling house thereon. Value, *$5,000.*	*The said lot and dwelling are a homestead duly acquired as provided by law, and the same free from all incumbrances.* Value, *$5,000.*	*The homestead aforesaid; one sewing machine, and clothing for self, wife, and nine children, with bed-room, dining, and kitchen furniture. No incumbrances.* Value, *$1,000.*	*No other personal property, except three thousand dollars in book accounts due for groceries and liquors sold, as appears from the books kept by me, made part hereof and marked Exhibits "A," "B," "C," and "D."*

John Brown, Petitioner.

OATH TO SCHEDULES AND INVENTORY.

I, *John Brown*, do solemnly swear that the Petition, Schedules "A," "B," "C," and Inventory, now delivered by me, contain a full, perfect, and true discovery of all the estate, real, personal, and mixed, goods and effects, to me in any way belonging; all such debts as are to me owing, or to any person or persons in trust for me, and all securities and contracts, and contracts whereby any money may hereafter become payable, or any benefit or advantage accrue to me, or to my use, or to any other person or persons in trust for me; that I have no lands, money, stock or estate, reversion or expectancy, beside that set forth in my Schedule and Inventory; that I have, in no instance, created or acknowledged a debt for a greater sum than I honestly and truly owe; that I have not, directly nor indirectly, sold, or otherwise disposed of, or concealed any part of my property, effects, or contracts; that I have not in any way compounded with my creditors, whereby to secure the same, or to receive, or to expect, any profit or advantage therefrom, or to defraud or deceive any creditor to whom I am indebted, in any manner. So help me God.

John Brown.

Sworn and subscribed before me, this *first* day of *December*, 1880.
L. S. *Fred. P. Stone, Notary Public.*

No. 1201.

BLANK PUBLISHED.

Adjudication of Insolvency, etc.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Brown*, An Insolvent Debtor.

John Brown, having filed in this Court his petition, schedule, and inventory in Insolvency, by which it appears that he is an Insolvent Debtor, the said *John Brown* is hereby declared to be insolvent. The Sheriff of the *City and* County of *San Francisco* is hereby directed to take possession of all the estate, real and personal, of the said *John Brown*, debtor, except such as may be by law exempt from execution, and of all his deeds, vouchers, books of account, and papers, and to keep the same safely until the appointment of an assignee of his estate. All persons are forbidden to pay any debts to the said Insolvent, or to deliver any property belonging to him, or to any person, firm, or corporation, or association for his use. The said Debtor is hereby forbidden to transfer or deliver any property, until the further order of this Court, except as herein ordered.

It is further Ordered, that all the Creditors of said Debtor be

and appear before the Hon. *Charles Halsey*, Judge of the Superior Court, of the *City and* County of *San Francisco*, in open Court, at the Court-room of said Court, in the *City and* County of *San Francisco*, on the *fourth* day of *January*, 1881, at *ten* o'clock, *A.* M., of that day, to prove their debts and choose one or more assignees of the estate of said Debtor.

It is further Ordered, that the order be published in the *Daily Evening Bulletin*, a newspaper of general circulation, published in the *City and* County of *San Francisco*, as often as the said paper is published before the said day set for the meeting of Creditors.

And it is further Ordered, that, in the mean time, all proceedings against the said Insolvent be stayed.

Dated *December* 1, 1880.

Charles Halsey,
Judge of the Superior Court.

No. 1231.

BLANK PUBLISHED.

Clerk's Receipt for Books, Vouchers, etc.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Brown*, An Insolvent Debtor. } Clerk's Receipt for Books, Vouchers, etc.

Received, this day, of *John Brown*, an Insolvent Debtor, the following described books: *One day book, one cash book, one ledger.*

Dated *December* 3, 1880.

W. A. Stuart,
Clerk.
By *John H. Harney*,
Deputy Clerk.

No. 1202.

BLANK PUBLISHED.

Publisher's Affidavit of Publication, etc.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Brown*, An Insolvent Debtor. }

State of California, *City and* County of *San Francisco*. } ss.

T. K. Fitch, of said *City and* County, being duly sworn, says: That he is a male citizen of the United States, of the age of

eighteen years and upwards, not interested in the matter of *John Brown*, an Insolvent Debtor;

That he is *one of* the publishers of the *Daily Evening Bulletin*, a newspaper of general circulation, printed and published in said *City and* County, and as such *he* has charge of all advertisements in said newspaper;

That a true, full, and correct copy of the annexed notice of the time and place of holding the meeting of Creditors of said Debtor, his Adjudication in Insolvency, and Stay of Proceedings *as* ordered by the Superior Court of the *City and* County of *San Francisco*, in the matter of said Insolvency, on the *third* day of *December*, 1880, was published in said newspaper for *thirty-three days* successively next before the day of sale mentioned in said Notice, and as often during the said period of *thirty-three days* as the said paper was printed, to wit: *on every day*.

T. K. Fitch.

Subscribed and sworn to before me,
this *third* day of *Janaury*, 1880.
L. S. *Fred P. Stone, Notary Public.*

No. 1203.

BLANK PUBLISHED.

Clerk's Affidavit of Publication, etc.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of
John Brown,
An Insolvent Debtor.

John H. Harney, being duly sworn, says: That he is *Deputy* County Clerk of the *City and* County of *San Francisco;* That on the *third* day of *December*, 1880, he served the Adjudication of Insolvency, Stay of Proceedings, and Order of Publication of Notice to Creditors, and Notice to Creditors, in the matter of *John Brown*, an Insolvent Debtor, upon each of the following named Creditors of said Debtor, being all mentioned in his Schedule, viz.: *Henry Brickwedel*, by depositing copies of said Adjudication of Insolvency, Stay of Proceedings, Order of Publication, and Notice to Creditors, in the United States Post Office, at *San Francisco*, in the *City and* County of *San Francisco*, inclosed in an envelope, postage prepaid, and addressed one to each of said Creditors, at his place of business, as stated in said Schedule.

John H. Harney, Deputy County Clerk.

Subscribed and sworn to before me,
this *third* day of *December*, 1880.
L. S. *Fred P. Stone, Notary Public.*

No. 1204.

BLANK PUBLISHED.

Clerk's Affidavit of Service, etc.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

State of California, } ss.
City and County of *San Francisco.* }

John H. Harney, being duly sworn, says: That he is *Deputy* County Clerk of said *City and* County, and was, at the time of making the service hereinafter mentioned and described, a male citizen of the United States of America, over eighteen years of age, and competent to be a witness in the within-entitled matter, and has no interest therein; that he personally served the annexed Adjudication of Insolvency, Stay of Proceedings, and Order of Publication, on the *third* day of *December*, 1880, upon the within-named *Creditor*, *Henry Brickwedel*, by delivering to each of said persons personally, in said County, a full, true, and correct copy of said Adjudication of Insolvency, Stay of Proceedings, and Order of Publication.

John H. Harney, Deputy County Clerk.

Subscribed and sworn to before me, this *third* day of *December*, 1880.
L. S. *Fred P. Stone, Notary Public.*

No. 1216.

BLANK PUBLISHED.

Order Appointing Assignee.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the matter of *John Brown*, An Insolvent Debtor. } Order of Court Appointing Assignee. In Open Court, January ...., 188..

Whereas, *John Brown* did on the *first* day of *December*, 1880, petition this Court *to be discharged from all his debts* in pursuance of the provisions of an act of the Legislature of the State of California, entitled "An Act for the Relief of Insolvent Debtors, for the protection of creditors, and for the punishment of fraudulent debtors," approved April 16, 1880, and the Court thereon, to wit, on the *first* day of *December*, 1880, made an order requiring the Creditors of said Insolvent to be and appear on the *fourth* day of *January*, 1881, before the said Court, at the Court-house thereof, in said County, to *choose an assignee of said estate*, in pursuance whereof the said Clerk did cause to be published a notice calling them to appear in the said Court, on

the said *fourth* day of *January*, 1881, on which day, it appearing and having been proved to the satisfaction of the Court that the said notice to the Creditors of said Insolvent had been *duly* published in pursuance of said Order, and *no* Creditors of said Insolvent appearing.

Now, therefore, It is Ordered, that *Thomas Varney* be and he is hereby appointed Assignee of the estate of said debtor, upon his filing a bond as provided by law in the sum of *ten thousand* dollars.

Dated this *fourth* day of *January*, 1881.

Charles Halsey,
Judge of the Superior Court.

No. 1218.

BLANK PUBLISHED.

Assignment by Clerk to Assignee.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the matter of *John Brown* An Insolvent Debtor. } Assignment in Insolvency, to Assignee Appointed by Order of Court.

This Indenture, made this *fourth* day of *January*, 1881, between *W. A. Stuart*, Clerk of the Superior Court of the *City and* County of *San Francisco*, State of California, party of the first part, and *Thomas Varney*, Assignee of the estate of *John Brown*, an insolvent debtor, party of the second part,

Witnesseth, That whereas, the said *John Brown*, on the *first* day of *December*, 1880, presented to the Honorable the Superior Court of the *City and* County of *San Francisco, his* petition in pursuance of the provisions of an Act of the Legislature of the State of California, entitled, an "Act for the Relief of Insolvent Debtors, for the Protection of Creditors, and for the Punishment of Fraudulent Debtors," approved April 16, 1880; *praying to be discharged from all his debts*, and such proceedings having been thereupon had in due form of law, that on the *fourth* day of *January*, 1881 (the creditors, although duly summoned, not having attended on the day appointed for their meeting, *and* refusing to appoint one or more assignees), the said Court did, by Order then duly made, appoint *Thomas Varney* assignee of the estate of said insolvent debtor, and to perform, in every respect, the functions of Assignee; and for the faithful performance of said trust, the said assignee having filed a bond as ordered by the Court:

Now, therefore, in consideration of the premises, and of the benefit of said Act, and in pursuance of and in obedience to the above recited Order and the said Act, the said party hereto, of the first part, hath granted, assigned, transferred, and set over, and by these presents doth grant, assign, transfer, and set over,

unto the said party of the second part, his successor, successors, or assigns, all, and all manner of goods, chattels, debts, moneys, deeds, books, and papers, and all other things, property, estate, and effects of the said party of the first part, real, personal, and mixed, of what kind, nature, or quality soever, and wheresoever the same may be situated, and whether in possession, reversion, remainder, or in action, at the time of the commencement of the said proceedings in insolvency, except such property as is exempt by law from execution.

To have and to hold the same and every part and parcel thereof unto the said party of the second part, his successor, successors, and assigns, forever, to and for the uses and purposes in the said Act declared.

In witness whereof, the said party of the first part hath hereto set his hand and the seal of said Superior Court, the day and year first above written.

L. S. *W. A. Stuart,*
Clerk.

No. 1211.

BLANK PUBLISHED.

Proof of Debt without Security.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the matter of *John Brown* An Insolvent Debtor.

State of California, *City and* County of *San Francisco.* } ss.

At the *City and* County of *San Francisco*, State of California, on the *fourth* day of *January*, 1881, before me personally appeared *Henry Brickwedel*, a resident of the *City and* County of *San Francisco*, State of California, and who, after being duly sworn, says: that *John Brown*, the person by whom a Petition for Adjudication of Insolvency is filed, *was*, at and before the filing of the said Petition, and still *is*, justly and truly indebted to *affiant* in the sum of *three thousand* dollars, and no payments have been made thereon. This Deponent says that he has not, nor has any person by *his* order, or to this Deponent's knowledge or belief, for *his* use, had or received any manner of satisfaction or security whatever.

And this Deponent further says, that the said claim was not procured for the purpose of influencing the proceedings in this matter; that no bargain or agreement, expressed or implied, has been made or entered into by or on behalf of this Deponent to sell, transfer, or dispose of said claim, or any part thereof, against said Debtor, or to take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of this Deponent for Assignee, or any action on the part of

this Deponent, or any other person, in the said proceedings, has been, is, or shall be in any way affected, influenced, or controlled.

Henry Brickwedel,
Deposing Creditor.

Subscribed and sworn to before me, this *fourth* day of *January*, 1881.

W. A. Stuart,
L. S. *County Clerk.*

I do hereby certify, that the within-contained demand of *Henry Brickwedel* against *John Brown*, the Insolvent Debtor within named, was proved to my satisfaction on the *fourth* day of *January*, 1881, for the sum of *three thousand* dollars, and is allowed at that amount.

Dated *January* 4, 1881.

Charles Halsey,
Judge of the Superior Court.

No. 1255.

BLANK PUBLISHED.

Petition for Homestead Order.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Brown*, An Insolvent Debtor. } Petition for Order Setting Apart Homestead for Use of Insolvent Debtor.

To the Honorable the Superior Court of the *City and* County of *San Francisco*, State of California:

The Petition of *John Brown* respectfully shows: That on the *first* day of *December*, 1880, the said *John Brown* was, by the said Court, duly adjudged an Insolvent Debtor, under the provisions of the Insolvent Act of 1880, of the State of California.

That a certain quantity of land in his inventory and schedules on file, and hereinafter particularly described, together with the dwelling-house thereon and its appurtenances, was selected by *him*, and was occupied by said Insolvent Debtor and his family at the time he was adjudged an Insolvent Debtor, as a homestead; that since the said time *of* said adjudication, and up to this date, has remained in possession of said homestead.

That the same does not exceed in value the sum of five thousand dollars.

That said selection was made by said Insolvent Debtor, declaring his intention, in writing, to claim the same as a homestead; that said declaration stated the value of said land, and that *he* was married; that *he was* at the time of making such declaration residing with his family on said premises (said premises being particularly described in said declaration), and that it was his intention to use and claim the same as a homestead, which said declaration was signed by the said party making the same, and acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded.

That the said quantity of land hereinbefore referred to is situated in said *City and* County of *San Francisco*, State of California, and is bounded and particularly described as follows, to wit:

Lot on the S. W. corner of Kearny and Washington streets, being twenty-five feet front on Kearny street, with a uniform depth of one hundred feet on Washington street.

Wherefore, your Petitioner prays that the said homestead, consisting of said quantity of land, together with the dwelling-house thereon and its appurtenances, be set apart for the use and benefit of said Insolvent Debtor.

And your Petitioner will ever pray, etc.

Dated *January* 20, 1880.

John Brown.

Geo. W. Tyler, Attorney for Petitioner.

No. 1256.

BLANK PUBLISHED.

Order Setting Apart Homestead.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Brown*, An Insolvent Debtor. } Order Setting Apart Homestead for Use of Insolvent Debtor.

John Brown, an Insolvent Debtor, having on the *twentieth* day of *January*, 1881, made application to this Court, by petition, for an order setting apart, for the use and benefit of said Insolvent Debtor, the homestead in said petition and hereinafter particularly described, together with the dwelling-house thereon and its appurtenances; and it duly appearing to said Court from the papers on file, and other evidence, that the prayer of said petition should be granted:

It is hereby Ordered, Adjudged, and Decreed, that all that certain lot, piece, or parcel of land, situate, lying, and being in the *City and* County of *San Francisco*, State of California, and bounded and described as follows, to wit:

Lot on the S. W. corner of Kearny and Washington streets, being twenty-five feet front on Kearny street, with a uniform depth of one hundred feet on Washington street.

Together with the dwelling-house thereon and its appurtenances, be, and the same is hereby set apart for the use and benefit of the said Insolvent Debtor; and that the same shall not be subject *to be applied to the payment of his debts.*

And it is further Ordered, that a certified copy of this decree be duly recorded in the office of the County Recorder of said *City and* County of *San Francisco.*

Dated *January* 29, 1881.

Charles Halsey,
Judge of the Superior Court.

No. 1257.

BLANK PUBLISHED.

Petition for Order Setting Apart Personal Property.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Brown*, An Insolvent Debtor. } Petition for Order Setting Apart Personal Property for Use of Insolvent Debtor.

To the Honorable the Superior Court of the *City and* County of *San Francisco*, State of California:

The Petition of *John Brown*, an Insolvent Debtor, respectfully shows: That on the *first* day of *December*, 1880, the said Petitioner was, by the said Court, duly adjudged to be an Insolvent Debtor, under the provisions of the Insolvent Act of 1880 of the State of California. That your Petitioner is advised and believes that the following personal property, belonging to said Estate, and mentioned in his inventory and schedules, on file in this matter, is by law exempt from execution, to wit: *One sewing-machine, one set of bed-room furniture, one dining-room set, and one stove and dishes, and utensils for cooking, and the necessary clothing for nine children, and self and wife, all valued at about one thousand dollars.*

Wherefore, your Petitioner prays that all of the said personal property may be set apart for the use and benefit of the said Insolvent Debtor.

And your Petitioner will ever pray, etc.

Dated *December* 20, 1880.

John Brown, Insolvent.

Geo. W. Tyler,
His Attorney.

No. 1258.

BLANK PUBLISHED.

Order Setting Apart Personal, etc.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Brown*, An Insolvent Debtor. } Order Setting Apart Personal Property for Use of Insolvent Debtor.

John Brown, an insolvent debtor, having this day made application to *this* Court, by petition, for an order setting apart, for the use of the said insolvent debtor, all personal property which is by law exempt from execution, and the matter having been duly considered,

It is hereby Ordered, that the following articles of personal property, to wit, *One sewing-machine, one set of bed-room fur-*

niture, one dining-room set, and one stove and dishes, and utensils for cooking, and the necessary clothing for nine children, and for petitioner and his wife, all valued at about one thousand dollars, be and the same are hereby set apart for the use and benefit of the said insolvent debtor, and that the same shall not be subject to be applied to the payments of his debts.

Dated *December* 20, 1880.

Charles Halsey,
Judge of the Superior Court.

No. 1249.

BLANK PUBLISHED.

Petition for Discharge.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Brown*, An Insolvent Debtor. } Petition of Insolvent for his Discharge.

To the Honorable the Superior Court of the *City and* County of *San Francisco:*

The petition of *John Brown* respectfully represents that on the *first* day of *December*, 1880, *he was* duly declared and adjudged an insolvent, under the provisions of an Act of the Legislature of the State of California, entitled "An Act for the Relief of Insolvent Debtors, for the Protection of Creditors, and for the Punishment of Fraudulent Debtors;" that *he* duly surrendered all *his* property, and rights of property, and *has* fully complied with and obeyed all the orders and directions of the Court touching *his* insolvency aforesaid; and that *he is* ready to submit to any other and further examinations, orders, and directions which the Court may require.

Wherefore your petitioner prays that he may be decreed by this honorable Court to have a full discharge from all *his* debts, and that a certificate of discharge may be granted to *him* in accordance with law.

John Brown, Petitioner.

Geo. W. Tyler, Attorney for Petitioner.

No. 1250.

BLANK PUBLISHED.

Order of Notice to Creditors

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Brown*, An Insolvent Debtor.

John Brown, an Insolvent Debtor, having applied to this Court for a discharge from his debts,

It is hereby Ordered, that the Clerk of this Court give notice to all creditors who have proved their debts, to appear before this Court, at the Court-room thereof, on the *nineteenth* day of *January*, 1880, at the hour of *ten* o'clock *A.* M., and show cause, if any they have, why the said *John Brown* should not be discharged from all his debts, in accordance with the statutes in such cases made and provided.

It is further Ordered, that notice of said application be given to the creditors by mail, and by publication for four weeks in the *Daily Evening Bulletin*, a newspaper published in said County.

Charles Halsey,
Judge of the Superior Court.

No. 1252.

BLANK PUBLISHED.

Opposition to Discharge.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Brown*, An Insolvent Debtor.

John Brown, claiming to be an Insolvent Debtor within the provisions of an Act of the Legislature of the State of California, entitled "An Act for the Relief of Insolvent Debtors, for the Protection of Creditors, and for the Punishment of Fraudulent Debtors," approved April 16, 1880, having filed his application for discharge from his debts; now comes *Henry Brickwedel, a* creditor of said insolvent, and opposes the discharge of said debtor, upon the following grounds: *The said John Brown, upon the fifteenth day of November*, 1880, *with intent to defraud his creditors, and being insolvent, did give to his wife one thousand dollars in gold coin, and the said money, nor any part thereof, has been surrendered to the assignee appointed by this Court.*

Wherefore the said creditor prays that the said *John Brown* may not be discharged from *his* debts, as applied for by him.

Henry Brickwedel.

Charles N. Fox, Attorney for *the* Creditor.

State of California, } ss.
City and County of *San Francisco.* }

Henry Brickwedel, being duly sworn, says that *he is a* creditor of said insolvent; that he has heard read the foregoing opposition, and that the same is true of *his* own knowledge, except as to those matters therein stated upon *his* information and belief, and that as to those matters *he* believes it to be true.

Henry Brickwedel.

Subscribed and sworn to before me, this *tenth* day of *January,* 1881.

L. S. *Fred. P. Stone, Notary Public.*

No. 1253.

BLANK PUBLISHED.

Oath of Insolvent.

In the Superior Court of the *City and* County of *San Francisco,* State of California.

In the Matter of *John Brown,* An Insolvent Debtor. }

State of California, } ss.
City and County of *San Francisco.* }

John Brown, being duly sworn, says that he has applied to the Superior Court of the *City and* County of *San Francisco,* State of California, for discharge from his debts, under the provisions of an Act of the Legislature of the State of California, entitled "An Act for the Relief of Insolvent Debtors, for the Protection of Creditors, and for the Punishment of Fraudulent Debtors," approved April 16, 1880; that he has not done, suffered, or been privy to any act, matter, or thing specified in the said Act as ground for withholding such discharge, if granted.

John Brown, Insolvent Debtor.

Subscribed and sworn to before me, this *third* day of *January,* 1881.

L. S. *Fred. P. Stone, Notary Public.*

No. 1254.

BLANK PUBLISHED.

Certificate of Final Discharge.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the matter of *John Brown*, An Insolvent Debtor. } Certificate of Final Discharge of Insolvent.

Whereas, *John Brown* has been duly adjudged an insolvent, under the Insolvent Laws of this State, and appears to have conformed to all the requirements of the law in that behalf:

It is therefore ordered by the Court, that said *John Brown* be, and he hereby is, forever discharged from all debts and claims which by said insolvent laws are made provable against his estate, and which existed on the *first* day of *December*, 1880, on which the petition for adjudication was filed by *him*, excepting such debts, if any, as are by said insolvent laws excepted from the operation of a discharge in insolvency.

Given under my hand and the seal of the Court, this *twentieth* day of *January*, 1881.

Charles Halsey,
Judge of the Superior Court.

Attest: *John H. Harney*,
Deputy Clerk.

No. 1205.

BLANK PUBLISHED.

Creditors' Petition in Insolvency.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

To the Honorable the Superior Court of the *City and* County of *San Francisco*, State of California:

The petition of *Thomas Field, John Small, Charles Black, Oscar White, and Alphonso Redman* respectfully shows: That petitioners are each residents of the State of California, and that *John Smith* is indebted to your petitioners as follows: To *Thomas Field* in the sum of $500; to *John Small* in the sum of $1,000; to *Charles Black* in the sum of $1,500; to *Oscar White* in the sum of $2,000; to *Alphonso Redman* in the sum of $2,500; in all *seven thousand five hundred dollars*. And neither of said petitioners has become a creditor of said *John Smith* by assignment within thirty days prior to the filing of this petition.

That the said *John Smith was on the first day of August, A. D.* 1880, *insolvent. That on the day last aforesaid the said John Smith, in the Superior Court of the City and County of San Francisco, in*

the action entitled William Brown v. John Smith, confessed judgment in favor of the said William Brown, who was then a creditor of the said John Smith, for the sum of one thousand dollars. That the said judgment was duly entered and the same now stands of record as entered. That the said *John Smith* is now a resident of the *City and County of San Francisco*, State of California.

Wherefore, your petitioners pray that the said Court issue its order to the said *John Smith* to show cause at a time and place fixed by the Court why he, the said *John Smith*, should not be adjudged an insolvent debtor, and the surrender of his estate be made for the benefit of his creditors, in the manner required of insolvent debtors.

Thomas Field,
John Small,
Charles Black,
Oscar White,
Alphonso Redman,
Petitioners.

E. F. Preston,
Attorney for Petitioners.

State of California, } ss.
City and County of *San Francisco.* }

Thomas Field, John Small, Charles Black, Oscar White, and Alphonso Redman being each severally sworn, doth say on oath:

That he has heard read the foregoing petition, and is acquainted with the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and that as to those matters he believes it to be true.

Thomas Field,
John Small,
Charles Black,
Oscar White,
Alphonso Redman,
Petitioning Creditors.

Subscribed and sworn to before me this *second* day of *August*, 1880. *Fred. P. Stone, Notary Public.*

L. S.

No. 1207.

BLANK PUBLISHED.

Creditor's Bond.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor.

Whereas, *Thomas Field, John Small, Charles Black, Oscar White, and Alphonso Redman*, have filed a petition in the Supe-

rior Court of the *City and* County of *San Francisco*, stating that *John Smith* is, and praying that he be declared an insolvent debtor; now we, the undersigned, jointly and severally undertake in the sum of five hundred dollars, that if the said *John Smith* should not be declared an insolvent debtor, the said petitioners will pay all costs and damages, including a reasonable attorney's fee, that the said debtor may sustain by reason of the filing of said petition.

Witness our hands this *second* day of *August*, 1880.

Charles Johnson.
John I. Sherwood.

No. 1208.

BLANK PUBLISHED.

Order to Show Cause, etc.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith* An Insolvent Debtor.

Upon reading and filing the petition of *Thomas Field, John Small, Charles Black, Oscar White, and Alphonso Redman*, and good cause appearing therefor:

It is ordered, that *John Smith* be and appear before this Court, at the court-room thereof, in the *City and* County of *San Francisco*, on the *fifteenth* day of *August*, 1880, at *ten* o'clock, *A.* M., of said day, then and there to show cause, if any he can, why he should not be adjudged an insolvent debtor, and a surrender of his estate be made for the benefit of his creditors in the manner required of insolvent debtors.

And it is further ordered, that until the further order of this Court, the said *John Smith* be and he is hereby forbidden to transfer any property, and is enjoined from collecting or receiving any debts; and the creditors of the said *John Smith* are hereby forbidden to pay any debt to the said *John Smith*, or to deliver to him any property belonging to him, or to any person, firm or corporation for his use.

Dated *August* 2, 1880.

Charles Halsey,
Judge of the Superior Court.

No. 1209.

BLANK PUBLISHED.

Order of Adjudication, etc.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith* An Insolvent Debtor. } Order of Adjudication and requiring Debtor to File Schedule.

The matter of the petition of *Thomas Field, John Small, Charles Black, Oscar White, and Alphonso Redman*, praying that *John Smith* may be adjudged to be an insolvent debtor, coming on regularly to be heard this *fifteenth* day of *August*, 1880, and *E. F. Preston* appearing for said petitioners, and *Vanclief, Stewart, and Herrin* appearing for said *John Smith*, and it further appearing to the Court that *the said John Smith, after being duly and regularly served, has made default;* and it further appearing to the Court that all of the allegations contained in said petition are true:

It is hereby ordered, adjudged and decreed, that the said *John Smith* now is, and on the *second* day of *August*, 1880, the date of the filing of the petition aforesaid, was insolvent within the true intent and meaning of an Act of the Legislature of the State of California, entitled, "An Act for the Relief of Insolvent Debtors and Protection of Creditors, and for the Punishment of Fraudulent Debtors," passed April 16, 1880. And it is further ordered, that the said *John Smith* file in this Court, within *ten* days from the date hereof, a schedule and inventory, in accordance with sections three and four of the said Act.

Dated *August* 15, 1880.

Charles Halsey,
Judge of the Superior Court.

No. 1212.

BLANK PUBLISHED.

Proof of Debt Generally.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor. }

State of California, *City and* County of *San Francisco*. } ss.

At the *City and* County of *San Francisco*, State of California, on the *sixteenth* day of *August*, 1880, before me personally appeared *Oscar White*, a resident of *the City and* County of *San Francisco*, State of California, and who, after being duly sworn and examined, at the time and place aforesaid, upon his oath, says

that *John Smith*, the person *against* whom a petition for Adjudication of Insolvency *was* filed, was, at and before the filing of the said petition, and still is, justly and truly indebted to *him* in the sum of *two thousand* dollars *for goods sold and delivered to him on the first day of July*, 1880; *to wit: One hundred sacks of wheat and one thousand sacks of barley;* and *no* action has been brought thereon. This deponent *has* received *no* security, *no* satisfaction whatsoever; that the claim was not procured for the purpose of influencing the proceedings in this matter; that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of this deponent, to sell, transfer, or dispose of said claim, or any part thereof, against said Insolvent, or to take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of this deponent for assignee, or any action on the part of this deponent, or any other person in the said proceedings, has been, is, or shall be, in any way affected, influenced, or controlled.

Oscar White,
Deponent.

Subscribed and sworn to before me, this *sixteenth* day of *August*, 1880.

Charles Halsey,
Judge of the Superior Court.

State of California, } ss.
City and County of *San Francisco.* }

I do hereby certify that the within contained demand of *Oscar White* against *John Smith*, the Insolvent Debtor within named, was proved to my satisfaction, on the *sixteenth* day of *August*, 1880, for the sum of *two thousand* dollars and .... cents, and is allowed at that amount.

Dated *August* 16, 1880.

Charles Halsey,
Judge of the Superior Court.

No. 1210.

BLANK PUBLISHED.

Proof of Debt with Security.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor. }

State of California, } ss.
City and County of *San Francisco.* }

At the *City and* County of *San Francisco*, State of California, on the *sixteenth* day of *August*, 1880, before me personally ap-

peared *Thomas Field*, a resident of the *City and* County of *San Francisco*, and State of *California*, and who, after being duly sworn, says that *John Smith*, the person by whom a petition for Adjudication of Insolvency is filed, *was*, at and before the filing of the said petition, and still *is*, justly and truly indebted to *Thomas Field, this affiant, for five hundred dollars loaned him on the seventeenth day of June*, 1880, *at the City of Sacramento, in the State of California*, in the sum of *five hundred* dollars, and that no payments have been made thereon. This Deponent says that he has not, nor has any person by *his* order, or to this Deponent's knowledge or belief, for *his* use, received any security or satisfaction whatsoever, save and except the *mortgage* hereinafter mentioned; that the claim was not procured for the purpose of influencing the proceedings in this matter; that no bargain or agreement, express or implied, has been made or entered into by or on behalf of this Deponent to sell, transfer, or dispose of said claim, or any part thereof, against said debtor, or to take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of this Deponent for Assignee, or any action on the part of this Deponent, or any other person in the proceedings under said statutes, has been, is, or shall be in any way affected, influenced, or controlled. *At the time of said loan of five hundred dollars the said John Smith gave affiant a mortgage upon the fifty-vara lot No. 7, in block No. 3172, in the Western Addition to the City and County of San Francisco. The said mortgage was duly recorded in the proper office, and is attached hereto and made part of this affidavit;* and *I* do hereby release the said security.

Thomas Field, Deponent.

Subscribed and sworn to before me, the *sixteenth* day of *August*, 1880.
L. S. *Fred P. Stone, Notary Public.*

State of California, } ss.
City and County of *San Francisco.* }

I do hereby certify that the within-contained demand of *Thomas Field*, against *John Smith*, the Insolvent Debtor within named, with security, as in said deposition stated, was proved to my satisfaction on the *sixteenth* day of *August*, 1880, for the sum of *five hundred* dollars, and is allowed at that amount.

Dated *August* 16, 1880.

Charles Halsey, Judge of the Superior Court.

No. 1213.

BLANK PUBLISHED.

Choice of Assignees.

[First meeting of Creditors.]

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith* An Insolvent Debtor.

State of California, *City and* County of *San Francisco.* } ss.

In open Court, *September* 29, 1880.

MEMORANDUM. This being the day appointed by the Court for the meeting of creditors in the above matter, and of which due notice has been given in the *Daily Evening Bulletin*, and by special notice served personally, or through the mail, we whose names are hereunder written, being the majority in amount of claims against said debtor aforesaid, and who have proven our debts, have chosen, and do hereby nominate and choose, *John Hale* to be the assignee of the said debtor's estate and effects, and we do desire that he may be appointed such assignee accordingly:

Names of Creditors above memtioned.	Residence of the same.	Amount of Debt.
Thomas Field.....	*City and County of San Francisco.*	$ 500 00
John Small.....	" " " " "	1,000 00
Charles Black.....	" " " " "	1,500 00
Oscar White.....	" " " " "	2,000 00
Alphonso Redman..	" " " " "	2,500 00

I do hereby accept the said trust.

John Hale, Assignee.

I, *Charles Halsey*, Judge of the said Court, do hereby approve of the said choice of assignee.

Dated the *twenty-ninth* day of *September*, 1880.

Charles Halsey,
Judge of the Superior Court.

No. 1214.

BLANK PUBLISHED.

Notice to Assignee.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor.

To John Hale, Esq.

You are hereby notified, that at a meeting of the creditors of *John Smith*, an insolvent debtor, held in open Court in the Superior Court of the *City and* County of *San Francisco*, on the *twenty-ninth* day of *September*, 1880, you were elected assignee of the estate of the said insolvent debtor; and, by order of the Court, you are hereby directed to file a bond to the State of California with the Clerk of this Court, in the sum of *ten thousand dollars, as fixed by this Court*, with two or more sufficient sureties, to be approved by the Court, conditioned for the faithful performance of the duties devolving upon you as such assignee.

The said bond shall be filed within *ten* days from the date hereof.

Dated *September* 29, 1880.

W. A. Stuart, Clerk.

No. 1215.

BLANK PUBLISHED.

Bond of Assignee.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the matter of *John Smith*, An Insolvent Debtor.

Know all Men by these Presents:

That *we, Joseph Fox and Henry Harris*, are held and firmly bound unto the State of California in the sum of *ten thousand* dollars, *gold coin* of the United States of America, to be paid to the said State of California, or assigns; for which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed and dated the *thirtieth* day of *September*, one thousand eight hundred and eighty.

The Condition of the above obligation is such, that, whereas, in the Superior Court of the *City and* County of *San Francisco*, State of California, on the *twenty-ninth* day of *September*, 1880, *John Hale* was, by the Creditors of *John Smith*, an Insolvent

Debtor, duly elected Assignee of his estate. Now, if the said *John Hale*, Assignee, as aforesaid, shall faithfully perform the duties devolving upon him as such Assignee, then the above obligation to be void, otherwise to remain in full force and virtue.

Signed, sealed, and delivered in the presence of *Wm. Smith.* — *Joseph Fox.* (L. S.) *Henry Harris.* (L. S.)

No. 1217.

BLANK PUBLISHED.

Assignment by Clerk to Assignee.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor. } Assignment in Insolvency to Assignee.

This Indenture, made this *third* day of *October*, 1880, between *W. A. Stuart*, Clerk of the Superior Court of the *City and* County of *San Francisco*, State of California, party of the first part, and *John Hale*, Assignee of the estate of *John Smith*, an Insolvent Debtor, party of the second part,

Witnesseth, that, whereas the *creditors of John Smith, an Insolvent Debtor, having*, on the *second* day of *August*, 1880, presented to the Honorable the Superior Court of the *City and* County of *San Francisco a petition praying that he might be declared an Insolvent Debtor* in pursuance of the provisions of an Act of the Legislature of the State of California, entitled, an "Act for the Relief of Insolvent Debtors, for the Protection of Creditors, and for the Punishment of Fraudulent Debtors," approved April 16, 1880; and such proceedings having been thereupon had in due form of law, that on the *twenty-ninth* day of *September*, 1880, the creditors, having been duly summoned, and having attended on the day appointed for their meeting, and having appointed *John Hale*, the party of the second part, Assignee of the estate of said Insolvent Debtor; and for the faithful performance of said trust, the said Assignee having filed a bond *in the sum of ten thousand dollars*, as ordered by the Court:

Now, therefore, in consideration of the premises and of the benefit of said Act, and in pursuance of, and in obedience to, the above recited Order and the said Act, the said party hereto, of the first part, hath granted, assigned, transferred, and set over, and by these presents doth grant, assign, transfer, and set over unto the said party of the second part, his successor, successors, or assigns, all and all manner of goods, chattels, debts, moneys, deeds, books, and papers, and all other things, prop-

erty, estate, and effects of the said *John Smith*, real, personal, and mixed, of what kind, nature, or quality soever, and wheresoever the same may be situated, and whether in possession, reversion, remainder, or in action, at the time of the commencement of the said proceedings in insolvency, except such property as is exempt by law from execution.

To Have and to Hold the same and every part and parcel thereof unto the said party of the second part, his successor, successors, and assigns, forever, to and for the uses and purposes in the said Act declared.

In Witness whereof, the said party of the first part hath hereto set his hand and the seal of said Superior Court the day and year first above written.

L. S.

W. A. Stuart,
Clerk.

No. 1224.

BLANK PUBLISHED.

Petition for Sale of Property.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor.

To the Honorable the Superior Court of the *City and* County of *San Francisco*.

The petition of *John Hale* respectfully shows: That he is the duly appointed, qualified, and acting Assignee of the Estate of *John Smith*, an Insolvent Debtor, now pending in said Court: That as such Assignee he has taken possession of all the estate described in the petition, schedule, and inventory of said Insolvent: That in order to pay the debts of said Insolvent it is necessary to sell all his estate vested in Petitioner as such Assignee.

Wherefore, Petitioner prays for an order of this Court, authorizing him to sell at *public auction* all the estate, real and personal, vested in him as such Assignee, upon the following terms, to wit, *for cash*. And upon each sale to execute to the purchaser the necessary conveyances and bills of sale.

The following is a description of the real estate belonging to said Insolvent Debtor's Estate, situated in the *City and* County of *San Francisco*, State of California, and bounded and described as follows, to wit:

[*Description by metes and bounds.*]

Dated *November* 10, 1880.

John Hale, Assignee.

Clement Smith, Attorney for Assignee.

No. 1219.

BLANK PUBLISHED.

Assignee's Notice of Appointment.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor. } Assignee's Notice of Appointment.

To whom it may concern: The undersigned hereby gives notice of his appointment as Assignee of the Estate of *John Smith*, an Insolvent Debtor, of *the City of San Francisco*, in the *City and* County of *San Francisco*, in the State of California, and who was, to wit, on the *fifteenth* day of *August*, 1880, adjudged an Insolvent Debtor, upon the petition of *his creditors*, by the Superior Court of the *City and* County of *San Francisco*, State of California, dated at *San Francisco* the *twentieth* day of *September*, 1880.

John Hale, Assignee.

No. 1227.

BLANK PUBLISHED.

Petition to Sell Perishable Property.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor. }

John Hale, the Assignee of the estate of *John Smith*, an Insolvent Debtor, petitions this Court for an order to sell, immediately, the following described property belonging to the said estate, viz.:

[*Description.*]

Petitioner states that said property is of a perishable nature, *and* is liable to deteriorate in value—is disproportionately expensive to keep; and it will be for the best interests of the said estate to sell the said property immediately. *That a sale of said property at private sale will realize more than at public auction.*

Wherefore, petitioner prays for an order to sell all, or any part of, said property either at public auction or at private sale, as he may deem best for the interests of said estate.

Dated *October* 20, 1880.

John Hale, Assignee.

Clement Smith, Attorney for Assignee.

State of California, } ss.
City and County of *San Francisco.* }

John Hale, being duly sworn, says: that he is the Assignee of the Estate of *John Smith*, an Insolvent Debtor. That he has heard read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon his information and belief, and that as to those matters he believes it to be true.

John Hale.

Subscribed and sworn to before me, this *twentieth* day of *October*, 1880.

L. S. *Fred P. Stone,*
Notary Public.

No. 1225.

BLANK PUBLISHED.

Order Fixing Day, etc.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor. }

John Hale, the Assignee of the Estate of *John Smith*, an Insolvent Debtor, having filed in this Court his petition praying for an order to sell *all* the property of said estate at private sale,

It is hereby ordered that *Monday*, the *tenth* day of *November*, 1880, at the Court Room of this Court, in the *City and* County of *San Francisco*, at the hour of *ten* o'clock *A.* M., be set for the hearing of said petition; and that this order be published in the *Daily Evening Bulletin*, a newspaper of general circulation, published in the *City and* County of *San Francisco*, as often as said paper is published before the said day set for the hearing of said petitions.

Dated *October* 20, 1880. *Charles Halsey,*
Judge of the Superior Court.

No. 1228.

BLANK PUBLISHED.

Order to Sell Perishable Property.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor. }

Upon reading and filing the Petition of *John Hale*, the Assignee of the Estate of *John Smith*, an Insolvent Debtor, pray-

ing for an order to sell immediately at private sale or public auction, as he may deem best for the interests of said Estate, certain property described in said Petition. And it appearing to the Court that it is for the best interests of said Estate that said property should be immediately sold, as prayed for in said Petition: It is ordered that the said Assignee immediately sell said property either at private sale or at public auction, with or without notice, as he may deem best for the interests of said Estate.

Dated *November* 10, 1880.

Charles Halsey,
Judge of the Superior Court.

No. 1226.

BLANK PUBLISHED.

Order for Sale of Property.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor.

Upon reading and filing the Petition of *John Hale*, Assignee of the Estate of *John Smith*, an Insolvent Debtor, praying for an Order to sell *certain real* estate, belonging to said Estate, and it appearing to the Court that it is necessary to sell *all* the *real* estate of the said Insolvent Debtor, vested in the Assignee: It is ordered that the said Assignee sell at public auction, giving *ten* days previous notice thereof by publication in the *Daily Evening Bulletin* of the time, place, and conditions of said sale, all the said real *estate*; That said property be sold to the highest bidder for *cash;* That if the said property be not disposed of upon the day fixed in the said notice of sale, then the said sale may be continued from day to day until all said property is disposed of. The following is a description of the real estate belonging to said Insolvent Debtor's Estate, which is ordered to be sold. Situated in the *City and* County of *San Francisco*, State of California, and bounded and described as follows, to wit: [*Description.*] Upon any sale being made, the said Assignee shall execute to the purchaser all necessary conveyances and bills of sale.

Dated *November* 20, 1880.

Charles Halsey,
Judge of the Superior Court.

No. 1229.

BLANK PUBLISHED.

Petition for Leave to Compound.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor.

To the Honorable the Superior Court of the *City and* County of *San Francisco:*

The petition of *John Hale* respectfully shows: That he is the Assignee of the Estate of *John Smith*, an Insolvent Debtor, now pending in this Court, and was appointed assignee by *the creditors of said insolvent in* this Court; that the following named persons and firms are indebted to said estate in the sums set opposite to their names, viz.:

Henry Slack	$1000 00
John Shirk	500 00

That *the said debtors have no property out of which the said sums could be made upon execution; but they each offer to pay twenty-five cents on the dollar of their indebtedness, in full discharge*, and it is therefore for the best interests of said estate to compound said debts with said debtors, by accepting less than the several sums due, and in full payment, and upon payment of the sums agreed upon, to discharge said debtors from said debts.

Wherefore, petitioner prays for an order, authorizing him to compound with said debtors, and upon payment of the sum agreed upon, to discharge all demands of said estate against each of said persons.

Dated *November* 10, 1880.

John Hale, Assignee.

Clement Smith,
Attorney for Assignee.

No. 1230.

BLANK PUBLISHED.

Order to Compound.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor.

Upon reading and filing the petition of *John Hale*, Assignee of the estate of *John Smith*, an Insolvent Debtor, praying for an order to compound with certain debtors of said estate, and

it appearing to the Court that it is for the best interests of said estate for such settlement to be made as prayed for in said petition, it is ordered that the prayer of said petition be granted, and that the said assignee be, and he is hereby granted full power and authority to compound with said debtors upon such terms and conditions as he may deem best for said estate.

Dated *November* 10, 1880.

Charles Halsey,
Judge of the Superior Court.

No. 1232.

BLANK PUBLISHED.

Assignee's Complaint.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the matter of *John Smith* An Insolvent Debtor.

To the Honorable the Superior Court of the *City and* County of *San Francisco.*

The undersigned, Assignee of the Estate of *John Smith*, an Insolvent Debtor, complains of *Bugbee Baldwin*, and for cause of complaint alleges: That the said *Bugbee Baldwin* has, as complainant is informed and believes, *in his possession one gold watch of the value of two hundred dollars which is the property of the said insolvent, which he refuses to deliver to the undersigned, assignee of said estate.*

Wherefore, complainant prays that the said *Bugbee Baldwin* may be cited to appear before said Court, and may be then examined under oath upon the matters and things herein complained of.

John Hale,
Assignee.

Clement Smith,
Attorney for Assignee.

State of California, *City and* County of *San Francisco.* } ss.

John Hale, being duly sworn, says: That he is the Assignee of the Estate of *John Smith*, an Insolvent Debtor: That he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated upon his information and belief, and that as to those matters he believes it to be true.

John Hale.

Subscribed and sworn to before me, this *third* day of *December*, 1880.

L. S.

Fred. P. Stone,
Notary Public.

No. 1233.

BLANK PUBLISHED.

Order for Examination.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith* An Insolvent Debtor.

Upon reading and filing the complaint of *John Hale*, assignee of the estate of *John Smith*, an insolvent debtor, stating that *Bugbee Baldwin has in his possession certain property in said complaint described, the property of said estate; and has knowledge of other property of said estate.*

It is ordered that the said *Bugbee Baldwin* appear before this Court in open Court on *Monday*, the *twentieth* day of *December*, 1880, at the court-room of this Court, in the *City and* County of *San Francisco*, at the hour of *ten* o'clock *A.* M., or as soon thereafter as the matter can be heard, then and there to be examined under oath touching all the matters and things in said complaint complained of; and to then and there render a full account upon oath of any property of said debtor you may have knowledge or possession of, or which has come into your possession in trust for the said debtor; or which belongs to said estate.

Dated *December* 3, 1880.

Charles Halsey,
Judge of the Superior Court.

No. 1234.

BLANK PUBLISHED.

Order to Disclose Property.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor.

It appearing from the examination of *Bugbee Baldwin*, had in open court upon the *twentieth* day of *December*, 1880, that he has *knowledge of property of value belonging to said estate:* It is ordered, that the said *Bugbee Baldwin* immediately disclose his knowledge thereof to *John Hale*, the Assignee of the Estate of *John Smith*, an Insolvent Debtor.

Dated *December* 20, 1880.

Charles Halsey,
Judge of the Superior Court.

No. 1235.

BLANK PUBLISHED.

Order of Commitment—Refusal to Appear.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor.

Whereas, upon the *tenth* day of *October*, 1880, *John Hale*, Assignee of the Estate of *John Smith*, an Insolvent Debtor, filed his complaint in this Court, charging that *Charles Coffman had property in his possession belonging to said estate of the value of one thousand dollars:* Wherefore, this Court made its order, directing the said *Charles Coffman* to appear before this Court, upon a day stated in said order, then and there to be examined under oath touching all the matters and things in said complaint complained of, and herein above set forth. And this Court having, on the *tenth* day of *October*, 1880, made its order, directing the said *Charles Coffman* to submit to an examination relating to said matters, and to answer interrogatories touching the matters of the said complaint. And the said *Charles Coffman*, after having been duly cited, refuses to appear and submit to an examination, as aforesaid, or to answer such interrogatories: It is therefore ordered, that the said *Charles Coffman* be committed to the County Jail of the *City and* County of *San Francisco*, State of California, there to remain in close custody until he submit to the said order of Court, or is discharged according to law.

Charles Halsey,
Judge of the Superior Court.

No. 1236.

BLANK PUBLISHED.

Order of Commitment—Refusal to Disclose.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor.

Whereas, upon the *twentieth* day of *December*, 1880, *John Hale*, Assignee of the Estate of *John Smith*, an Insolvent Debtor, filed his complaint in this Court, charging that *Bugbee Baldwin has knowledge of property of value belonging to said estate*: Whereupon, this Court made its order, directing the said *Bugbee*

Baldwin to appear before this Court upon a day stated in said order, then and there to be examined under oath touching all the matters and things in said complaint complained of, and herein above set forth, and this Court having, on the *twentieth* day of *December*, 1880, made its order, directing the said *Bugbee Baldwin* to immediately disclose his knowledge of said matters to *John Hale*, the Assignee of said Insolvent Debtor. And it appearing to the Court, after full examination of the matter, that the said *Bugbee Baldwin* has neglected and refused, and still does neglect and refuse, to obey the said last aforesaid order: It is therefore ordered, that the said *Bugbee Baldwin* be committed to the County Jail of the *City and* County of *San Francisco*, State of California, there to remain a prisoner until the said order is complied with, or until he be discharged according to law.

Charles Halsey,
Judge of the Superior Court.

No. 1239.

BLANK PUBLISHED.

Order on Assignee to Report.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor.

Good cause having been shown therefor: Upon the petition and motion of *Oscar White* and *Alphonso Redman*, two creditors of the said estate,

You are hereby ordered to file your report and account herein, showing the amount of moneys received and paid out by you as assignee of said estate (and also a general report of the condition of the estate, and the probable amount that may be realized therefrom), up to and including the *first* day of *July*, 1881. The said account to be filed on or before the *fifteenth* day of *June*, 1881.

Dated *June* 1, 1881.

Charles Halsey,
Judge of the Superior Court.

No. 1237.

BLANK PUBLISHED.

Assignee's Exhibit.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor.

John Hale, assignee of the estate of *John Smith*, an insolvent debtor, herewith exhibits to the Court and the creditors of said estate a just and true account of all his receipts and payments on account of said estate; and a statement of the property of said estate outstanding, with the cause of its outstanding, and a schedule of debts or claims yet undetermined, and a statement of what sum remains in his possession.

Dr. To Cash.		Cr. By Cash.	
From sales of property	$10,000 00	*Paid dividend No.* 1	$9,000 00
		Paid expenses as per vouchers on file	1,000 00
	$10,000 00		$10,000 00

Property Outstanding.	Cause of its Outstanding.	Debts and Claims Outstanding.
One ship, the Dreadnaught, fully described in schedules.	*On a voyage to Cork, Ireland.*	*None.*

John Hale, Assignee.

Clement Smith,
Attorney for Assignee.

State of California, *City and* County of *San Francisco.* } ss.

John Hale, being duly sworn, says: That the foregoing exhibit is just and true to the best of his knowledge and belief.

John Hale,
Assignee of said Estate.

Subscribed and sworn to before me, this *twentieth* day of *June*, 1881.
L. S. *Fred. P. Stone, Notary Public.*

No. 1241.

BLANK PUBLISHED.

Account of Assignee.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor.

Now comes *John Hale*, the assignee of the estate of *John Smith*, an insolvent debtor, and files this, the final account of his administration of said estate.

He was appointed assignee on the *twenty-ninth* day of *September*, 1880, and immediately entering upon the discharge of his duties, he received from *John Smith*, as such assignee, all the personal property described in schedule "A" attached hereto; and also all the real estate described in schedule "B" attached hereto. That at the dates given in said schedules "A" and "B," he sold the property therein described and for the sums therein stated. That *all the property of said estate* has been disposed of. That schedule "C" is a summary statement of the cash received and expended, and expenses to be paid, with the balance on hand. That schedule "D" is the list of creditors proving their claims, when proven, with the residence and amounts proven and allowed. That after paying all expenses of administration there will remain on hand *nine thousand dollars*. That out of the said sum of *nine thousand dollars* each creditor will be entitled to receive the sum of *fifty cents* upon each dollar due him from the said estate, and no more.

Wherefore, the said assignee prays for an order of this Court declaring a dividend of *fifty cents* upon each dollar of claims proven as aforesaid, and that upon such payment the said assignee be discharged from his trust. That he makes schedules "A," "B," "C" and "D," part of this petition and account, and they are herein referred to.

John Hale, Assignee.

Clement Smith,
Attorney for Assignee.

SCHEDULE A.

Date.	Personal Property Received.	Date of Sale.	Cash Received.
	One hundred shares of Union Con.	*Dec.* 1, 1880.	$1000 00
	" " " " *Savage*.....	" " "	5000 00
	" " " " *Pictou*.....	" " "	4000 00
	Ship "Dreadnaught" not sold.....		

SCHEDULE B.

Date.	Real Estate Received.	Date of Sale.	Cash Received.
	No real estate received.....		

SCHEDULE C.

Date.	Summary of Cash Received and Expended.	Dr.	Cr.
1880.	*From sales of stock*.....	$10,000 00	
	Cash paid out and expended in dividends.....		$9000 00
	Cash paid out and expenses of estate.		1000 00

SCHEDULE D.

When Proven and Allowed.	Name of Creditor.	Residence.	Amount.
August 16, 1880.	*Oscar White*	*San Francisco*...	$2,000 00
" " "	*Thomas Field*.....	" "	500 00
" " "	*John Small*	" "	1,000 00
" " "	*Charles Black*.....	" "	1,500 00
" " "	*Alphonso Redman* ..	" "	2,500 00
" " "	*James Macdonald*...	" "	20,000 00

State of California,
City and County of *San Francisco.* } ss.

John Hale, being duly sworn, deposes and says that he is the Assignee of the estate of an Insolvent Debtor; that he has read the foregoing petition, account, and schedules "A," "B," "C," and "D," and knows the contents thereof, and that the same are true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters, he believes the same to be true.

John Hale.

Subscribed and sworn to before me, this *third* day of *August*, 1881.

L. S. *Fred. P. Stone, Notary Public.*

No. 1242.

BLANK PUBLISHED.

Assignee's Notice of Filing Account.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the matter of
John Smith
An Insolvent Debtor.

To

You are hereby notified that on the *third* day of *August*, 1881, the undersigned, Assignee of the Estate of *John Smith*, an Insolvent Debtor, filed in the Superior Court of the *City and* County of *San Francisco*, State of California, his *final* account, as such Assignee; and you are further notified that on the *tenth* day of *September*, 1881, in open Court, at the Court-room of

said Court, at the hour of 10 o'clock *A.* M., or as soon thereafter as the matter can be heard, he, the said Assignee, will apply to said Court for a settlement of his said account, and for a discharge from all liability as such Assignee.

Dated *August* 3, 1881.

John Hale, Assignee.

Clement Smith,
Attorney for Assignee.

No. 1243.

BLANK PUBLISHED.

Affidavit of Assignee.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor.

John Hale, assignee of the estate of *John Smith*, an insolvent debtor, being duly sworn, says: That on the *third* day of *August*, 1881, he notified, by mail, all the creditors of the said estate who have proved their claims, that on the *third* day of *August*, 1881, he had filed in the Superior Court of the *City and* County of *San Francisco* his final account as such assignee, and that he would, on the *tenth* day of *September*, 1881, in open court, at the court-room of said court, at the hour of *ten* o'clock *A.* M., or as soon thereafter as the matter could be heard, apply to said court for a settlement of his said account, and for a discharge from all liability as assignee. The said notices were deposited in the United States post-office at *San Francisco*, in the *City and* County of *San Francisco*, State of California, inclosed in envelopes, with the postage thereon paid, and were addressed, one to each of the said creditors whose claims have been proved, at their several places of residence.

John Hale, Assignee.

Subscribed and sworn to before me, this *third* day of *August*, 1881.

Fred. P. Stone,
Notary Public.

L. S.

Clement Smith, Attorney for Assignee.

No. 1244.

BLANK PUBLISHED.

Objection to Assignee's Account.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor.

John Hale, the assignee of the estate of *John Smith*, an insolvent debtor, having on the *third* day of *August*, 1881, filed in this court his *final* account as assignee, the undersigned, *a creditor* of said estate, hereby excepts to the said account, and contests the same, upon the following grounds: *The said assignee has charged* $9,000 *in his said account as expenses of administration, whereas the total expenses have been only* $500. Wherefore, the said *creditor* prays that the said account be not allowed.

Dated *September* 10, 1881.

James Macdonald, *Creditor.*

Clement Smith, Attorney for said Creditor.

No. 1245.

BLANK PUBLISHED.

Order Allowing Assignee's Account.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor.

John Hale, the assignee of the estate of *John Smith*, an insolvent debtor, having filed in this court his final account, and due notice of the filing of said account having been given to *all the* creditors whose claims have been proven, *and James Macdonald having filed his objections to said account, and the said account having been examined in open court upon the issues raised by the objections; and evidence having been taken and the said account having been found correct in every particular*, it is ordered that the said account be, and the same is hereby settled and allowed, and the said assignee is ordered to immediately pay to each of the creditors of said estate entitled thereto, in accordance with his said account, a dividend of *one per cent. upon the claims proved.* And upon compliance with this order, the said assignee shall be discharged from all liability as assignee to any creditor of the said insolvent.

Dated *December* 1, 1881.

Charles Halsey, Judge of the Superior Court.

No. 1246.

BLANK PUBLISHED.

Final Discharge of Assignee.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Smith*, An Insolvent Debtor.

John Hale, the Assignee of the Estate of *John Smith*, an Insolvent Debtor, having proved to the satisfaction of the Court that he has fully complied with the order of this Court, auditing and allowing his *final* account, and declaring a dividend to the creditors of said estate whose claims have been proved. It is hereby ordered, that the said Assignee be, and is hereby, discharged from his said office of Assignee, as aforesaid, free from all liability as such Assignee to any creditor of said Insolvent.

Dated *December* 15, 1881.

Charles Halsey,
Judge of the Superior Court.

No. 1247.

BLANK PUBLISHED.

Affidavit and Order for Examination.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Williams*, An Insolvent Debtor.

Samuel Davis, being duly sworn, says: That he is *Assignee* of the Estate of *John Williams*, an Insolvent Debtor, which estate is now pending in this Court: That *Ferdinand Rees* has property of the said Insolvent, *which he has refused upon demand to deliver to affiant, to wit, one thousand dollars in gold coin.*

Wherefore, affiant prays that the said *Ferdinand Rees* may be examined under oath touching the said matter.

Samuel Davis,

Subscribed and sworn to before me, this *eighth* day of *February*, 1881.

L. S. *Fred. P. Stone, Notary Public.*

A. L. Bancroft, Attorney for *the* Creditors.

State of California, *City and* County of *San Francisco*. } ss.

On reading the foregoing affidavit, and it satisfactorily appearing to me therefrom that *Ferdinand Rees* has property which

he unjustly refuses to *deliver to the Assignee of said estate, and the property of said estate*, and that it is a proper case for this order, and on application of *Samuel Davis*, I, the undersigned, *Judge of the* Superior Court of the *City and* County of *San Francisco*, State of California, do hereby order and require the said *Ferdinand Rees* personally to be and appear before *me* at *my chambers*, in the *City and* County of *San Francisco*, on the *twentieth* day of *February*, 1881, at *ten* o'clock in the *forenoon* of that day, to answer concerning *said* property; and that a copy of said affidavit and of this order be previously served upon said *Ferdinand Rees at least five days previous to said date.*

Dated *February* 8, 1881.

Charles Halsey,
Judge of the Superior Court.

No. 1238.

BLANK PUBLISHED.

Petition for Order on Assignee.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Willams*, An Insolvent Debtor.

To the Honorable the Superior Court of the *City and* County of *San Francisco*, State of California:

The petition of *George Brown, Samuel Davis, and David Samuels*, creditors of *John Williams*, an Insolvent Debtor, respectfully states: That *John Davis*, the Assignee of the said estate, has *refused and neglected, and does still refuse and neglect, to pay to the creditors of the said estate a dividend of ten cents on each dollar of their claims, as ordered by this Court, on the ninth day of January, A. D.* 1880*; and when the said order was made the Assignee had, and now has, sufficient funds on hand to pay said dividend.*

Wherefore, they pray for an order of this Court, directing the said Assignee *to pay the said dividend to the said creditors on or before the first day of February*, 1880, *or to show good cause why he refuses to obey the order of this Court, and failing to do which that he be discharged as Assignee.*

Dated *January* 20, 1881.

George Brown,
Samuel Davis,
David Samuels,
Creditors of said Estate.

A. L. Bancroft, Attorney for Creditors.

No. 1240.

BLANK PUBLISHED.

Order Removing Assignee.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John Williams*, An Insolvent Debtor.

Whereas, this court having, on the *ninth* day of *January*, 1881, upon petition and motion of *the* creditors of the estate of *John Williams*, an insolvent debtor, ordered *John Davis*, the assignee of said estate, to *forthwith pay to the creditors of the said estate a dividend of ten cents on each dollar of the indebtedness of said estate proved* on or before the *first* day of *February*, 1881; and the said time having elapsed, and the said assignee having failed to obey the said order, and no good cause being shown why he has failed to obey the said order, it is hereby ordered that the said *John Davis* be, and he is hereby, removed from his office as assignee, as aforesaid, and *Samuel Davis* is hereby appointed assignee of said estate in his stead, upon his filing a bond within *three* days from this date to the State of California, with *two* sureties, to be approved by this court, in the sum of *ten thousand* dollars, as provided by law. And the said *John Davis*, late assignee, is hereby ordered, upon the approval of said bond, to deliver to the said *Samuel Davis*, assignee, all the funds, property, books, vouchers, and securities belonging to the said insolvent, without charging or retaining any commission or compensation for his personal services.

Dated *February* 1, 1881.

Charles Halsey,
Judge of the Superior Court.

No. 1221.

BLANK PUBLISHED.

Petition for Removal of Assignee.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *William Jones*, An Insolvent Debtor.

To the Honorable the Superior Court of the *City and* County of *San Francisco:*

The undersigned creditor of *William Jones*, an insolvent debtor, respectfully represents: That *Henry Molineux* was on the *first* day of *January*, 1881, by this court duly appointed assignee of the estate of *William Jones*, an insolvent debtor, and

the said assignee duly qualified and took possession of the estate of said insolvent.

That the accounts of said assignee have not been settled and the estate completed. *That on the first day of November*, 1880, *this court ordered the said assignee to file his account within five days from said first day of November; that more than five days have elapsed and the said assignee has not filed his account.*

Wherefore, petitioner prays that the said *assignee* may be removed from his office of assignee, as aforesaid, and another assignee appointed in his stead.

Dated *November* 10, 1880.

Hiram Wilson.

Wm. J. Heney, Attorney for Petitioner.

No. 1222.

BLANK PUBLISHED.

Order to Show Cause, etc.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *William Jones*, An Insolvent Debtor.

Upon reading and filing the Petition of *Hiram Wilson, one of the* Creditors of the Estate of *William Jones*, an Insolvent Debtor, praying that *Henry Molineux*, Assignee of said Estate, be removed, and said Petition showing good cause therefor: It is ordered that the said Assignee, as aforesaid, show cause, if any he has, before this Court, on *Monday* the *first* day of *December*, 1880, at the hour of *ten* o'clock, or as soon thereafter as Counsel can be heard, why he should not be removed and another Assignee appointed in his stead, as prayed for in said Petition.

Dated *November* 10, 1880.

Charles Halsey,
Judge of the Superior Court.

No. 1223.

BLANK PUBLISHED.

Order Removing Assignee.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *William Jones*, An Insolvent Debtor.

The Petition of *Hiram Wilson, a* Creditor of the Estate of *William Jones*, an Insolvent Debtor, coming on this day to be

heard, and *it appearing that the said assignee has refused to file his account, as ordered by this Court:* It is ordered that *Henry Molineux*, the Assignee of said Estate, be and he is hereby removed, and *Hiram Wilson* is hereby appointed Assignee of said Estate in his stead, upon his filing a bond within *ten* days to the State of California in the sum of *one thousand* dollars ($1,000), with *two* good sureties, to be approved by this Court; and upon the approval of said bond, the said *Henry Molineux* is ordered to deliver to the said *Hiram Wilson* all the property of said Estate in his possession or under his control.

Dated *December* 1, 1880.

Charles Halsey,
Judge of the Superior Court.

No. 1220.

BLANK PUBLISHED.

Resignation of Assignee.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John A. Reichart*, An Insolvent Debtor.

To the Honorable the Superior Court of the *City and* County of *San Francisco*, State of California:

I hereby resign as Assignee of the estate of *John A. Reichart*, an Insolvent Debtor, now pending in said Court.

Dated *July* 5, 1880.

Assignee, *John Appel.*

No. 1259.

BLANK PUBLISHED.

General Affidavit of Publication.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John A. Reichart*, An Insolvent Debtor. } General Affidavit of Publication.

State of California, *City and* County of *San Francisco.* } ss.

Fred. McAlta, of the said *City and* County, being duly sworn, deposes and says that he is over eighteen years of age; that he has no interest whatsoever in the matter mentioned herein, nor a party thereto, and that he is the *Clerk* of the printers and

publishers of the *Daily Alta California*, a newspaper of general circulation published in said *City and* County, and has charge of all the advertisements in said newspaper, and that the *notice to creditors* in the matter of the estate of *John A. Reichart*, an Insolvent Debtor, of which the following is a printed copy:

[*Copy.*]

Has been published in the above-named newspaper, commencing *December* 3, 1880, and ending *January* 4, 1881, and further sayeth not.

Fred. McAlta.

Subscribed and sworn to before me this *fifth* day of *January*, 1881.

W. A. Stuart, Clerk.
By *John H. Harney*, Deputy Clerk.

No. 1251.

BLANK PUBLISHED.

Affidavit of Service by Mail.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John A. Reichart*, An Insolvent Debtor.

State of California, *City and* County of *San Francisco*. } ss.

John H. Harney, being duly sworn, deposes and says that he is *Deputy* County Clerk of the *City and* County of *San Francisco;* that on the *fifth* day of *January*, 1881, deponent served notice to creditors of the application of *John A. Reichart*, an insolvent debtor, to be discharged from all his debts, on file in said Court, by depositing such notices, on said date, in the Post-office at *the City and County of San Francisco*, properly inclosed in envelopes, addressed one to each of the creditors of said insolvent who have proved their debts, at their several places of residence, and prepaying the postage thereon.

John H. Harney, Deputy County Clerk.

Subscribed and sworn to before me, this *fifth* day of *January*, 1881.

L. S. *Fred. P. Stone, Notary Public.*

No. 1248.

BLANK PUBLISHED.

Subpena—Insolvency.

In the Superior Court of the *City and* County of *San Francisco*, State of California.

In the Matter of *John A. Reichart*, An Insolvent Debtor. } Subpena.

The People of the State of California send Greeting to *J. F. Crossman.*

We Command you, that all and singular business and excuses being set aside, you appear and attend before our said Superior Court of the *City and* County of *San Francisco*, State of California, at the court-room of said Court, in the *City and* County of *San Francisco*, on the *twenty-ninth* day of *April*, 1881, at *ten* o'clock *A.* M., then and there to testify in the above stated matter now pending in said Superior Court, on the part of *the estate*, and for a failure to attend you will be deemed guilty of contempt of Court, and liable to pay all losses and damages sustained thereby to the parties aggrieved, and forfeit one hundred dollars in addition thereto.

Witness, Honorable *Charles Halsey*, Judge of the said Superior Court, at the *City Hall*, in the *City and* County of *San Francisco*, this *twenty-fifth* day of *April*, 1881.

Attest my hand and the seal of said Court, the day and year last above written.

L. S.

W. A. Stuart,
Clerk.

By *John H. Harney*,
Deputy Clerk.

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